SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 600

HARRY E. HALLENBECK, RECEIVER OF SOUTH ASHLAND NATIONAL BANK, PETITIONER,

vs.

W. F. LEIMERT, RECEIVER OF CENTRAL MANUFACTURING DISTRICT BANK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 21, 1935.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Charles E. Woodward District Judge of the United States for the Northern District of Illinois, on Eighteenth day of December, in the year of our Lord one thousand nine hundred and Thirty-three, being one of the days of the regular December Term of said Court begun Monday the Eighteenth day of December, and of our Independence the 158th year. Placita.

Present:

Charles E Woodward.
H. C. W. Laubenheimer, U. S. Marshal.
Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

W. F. Leimert, Receiver of Central Manufacturing District Bank
vs.
Harry E. Hallenbeck, Receiver of South Ashland National Bank
} No. 41749

Be It Remembered, that the above-entitled action was commenced by the filing of the Declaration in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 9th day of February, 1933.

Mar. 10. 3 And on, to wit, the 10th day of March, 1933 there was filed in the Clerk's office of said Court a certain Summons with Marshal's Return endorsed thereon in words and figures following, to wit:

4 DISTRICT COURT OF THE UNITED STATES OF AMERICA

Northern District of Illinois

The President of the United States of America To the Marshal of the Northern District of Illinois—Greeting:

We Command You To Summon Harry E. Hallenbeck, Receiver of South Ashland National Bank if found in your District, to be and appear before our Judge of the District Court of the United States for the Northern District of Illinois, on the first day of the next Term thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of March next, to answer unto W. F. Leimert, Receiver of Central Manufacturing District Bank, of a plea of trespass on the case upon promises, to his damages, as he alleges, of Fifteen Thousand Dollars ($15,000.00), and have you then and there this Writ.

Witness, the Hon. John P. Barnes, Judge of the District Court of the United States of America, at Chicago aforesaid, this 30th day of January, in the year of our Lord one

thousand nine hundred and 33 and of our Independence the 157th year.

(Seal) CHARLES M. BATES
Clerk.

Served this writ on the within named Harry E. Hallenbeck Rec. etc. by reading the same to him and by leaving a copy thereof with him in person this 1 day of March A. D. 1933

H. C. W. LAUBENHEIMER,
U. S. Marshal
by THOS. E. GAVIN
Deputy

Marshal's Fees		
1	Services	$2.00
10	Miles	.60
	Total	2.60

5 And on, to wit, the 7th day of April, 1933 came the Plaintiff by his attorneys and filed in the Clerk's office of said Court a certain Amended Declaration in words and figures following, to wit: Filed Apr. 1933.

6 (Caption)

AMENDED DECLARATION.

W. F. Leimert, Receiver of Central Manufacturing District Bank, a banking institution organized under and by virtue of the laws of the State of Illinois, by Winston, Strawn & Shaw, his attorneys, complains of Harry E. Hallenbeck, Receiver of the South Ashland National Bank, a national banking association, who is a citizen of the State of Illinois, residing in the City of Chicago, and who is a resdent of the Eastern Division of the Northern District of Illinois aforesaid, of a plea that he render to the plaintiff the sum of Fifteen Thousand Dollars ($15,000) which he owes and unjustly detains from the plaintiff.

Plaintiff further represents that on the 4th day of August, 1932, he was appointed Receiver of the Central Manufacturing District Bank by Oscar Nelson, Auditor of Public Accounts of the State of Illinois, and thereafter, on the 6th day of August, 1932, in a case entitled, "People of the State of Illinois, ex rel Oscar Nelson, Auditor of Public Ac-

counts of the State of Illinois vs. Central Manufacturing District Bank," In Chancery No. B-247280, in the Circuit Court of Cook County, the appointment of plaintiff as Receiver was confirmed by the Circuit Court of Cook County; that on the 27th day of June, 1932, the Comptroller of Currency of the United States of America appointed the defendant, Harry E. Hallenbeck, Receiver of the South Ashland National Bank under the laws of the United States of America, and the said Harry E. Hallenbeck, since said date, has been and is now the duly qualified and acting Receiver of said bank, engaged in its liquidation.

I.

Plaintiff represents that on the 26th day of March, 1932, one James E. Hodgkinson, as Vice-President of Hodgkinson & Durfee, Inc., a corporation, drew its certain check upon the Central Manufacturing District Bank in the amount of Three Thousand Dollars ($3,000), payable to the South Ashland National Bank, and on, to-wit, said date, delivered the said check to the said South Ashland National Bank, a copy of said check being attached hereto, marked Exhibit "A" and made a part hereof.

Plaintiff further represents that thereafter, on to-wit, the 23rd day of April, 1932, the said South Ashland National Bank deposited said check with the Federal Reserve Bank of Chicago for clearance against the account in that bank of the Central Manufacturing District Bank; that on, to-wit, April 25, 1932, said Federal Reserve Bank of Chicago charged the amount of said check against the account of the Central Manufacturing District Bank, and then and there credited the amount thereof to said South Ashland National Bank; thereafter, on to-wit, said date, the said Federal Reserve Bank of Chicago delivered said check to the Central Manufacturing District Bank.

8 Plaintiff further represents that on said 25th day of April, 1932, said Hodgkinson & Durfee, Inc. had no funds on deposit with the Central Manufacturing District Bank to cover the amount of said check aforesaid; that on said 25th day of April, 1932, the Central Manufacturing District Bank advised the said James E. Hodgkinson, who was then and there a Vice-President of the said South Ashland National Bank, that there were no funds in the account of Hodgkinson & Durfee, Inc. to cover the amount of said check, and that the check would, therefore, be dishonored; that on the morning of April 26, 1932, said check was pre-

sented on behalf of the Central Manufacturing District Bank to the cashier of the South Ashland National Bank and demand made on said South Ashland National Bank that it reimburse the Central Manufacturing District Bank for the amount that had been been charged to its account through the Federal Reserve Bank of Chicago aforesaid; and the said South Ashland National Bank being so indebted then and there promised to pay the amount thereof to the Central Manufacturing District Bank; but the said South Ashland National Bank, through its officers, then and there refused so to do and continued so to do thereafter, until the appointment of the defendant as Receiver. Plaintiff further represents that since the appointment of said Hallenbeck as Receiver of said South Ashland National Bank, plaintiff has filed his claim with said Receiver, demanding the payment of the amount of said check aforesaid, but the said defendant has refused to allow the amount of said claim and continues so to do. To the damage of the plaintiff in the sum of Fifteen Thousand Dollars ($15,000), and therefore he brings this suit.

9 II.

Plaintiff represents that on the 26th day of March, 1932, one James E. Hodgkinson, as Vice-President of Hodgkinson & Durfee, Inc., a corporation, drew its certain check upon the Central Manufacturing District Bank in the amount of Two Thousand Six Hundred Dollars ($2,600), payable to the South Ashland National Bank, and on, to-wit, said date, delivered the said check to the said South Ashland National Bank, a copy of said check being attached hereto, marked Exhibit "B" and made a part hereof.

Plaintiff further represents that thereafter, on to-wit, the 23rd day of April, 1932, the said South Ashland National Bank deposited said check with the First National Bank of Chicago for clearance against the account in that bank of the Central Manufacturing District Bank; that on, to-wit, April 25, 1932, said First National Bank of Chicago charged the amount of said check against the account of the Central Manufacturing District Bank, and then and there credited the amount thereof to said South Ashland National Bank; thereafter, on to-wit, said date, the said First National Bank of Chicago delivered said check to the Central Manufacturing District Bank.

Plaintiff further represents that on said 25th day of April, 1932, said Hodgkinson & Durfee, Inc. had no funds

on deposit with the Central Manufacturing District Bank to cover the amount of said check aforesaid; that on said 25th day of April, 1932, the Central Manufacturing District Bank advised the said James E. Hodgkinson, who was then and there a Vice-President of the said South Ashland National Bank, that there were no funds in the account of Hodgkinson & Durfee, Inc. to cover the amount of said check, and that the check would, therefore, be dishonored; that on the morning of April 26, 1932, said check was presented on behalf of the Ceneral Manufacturing District Bank to the cashier of the South Ashland National Bank and demand made on said South Ashland National Bank that it reimburse the Central Manufacturing District Bank for the amount that had been charged to its account through the First National Bank of Chicago aforesaid; and the said South Ashland National Bank being so indebted then and there promised to pay the amount thereof to the Central Manufacturing District Bank; but the said South Ashland National Bank, through its officers, then and there refused so to do and continued so to do thereafter, until the appointment of the defendant as Receiver. Plaintiff further represents that since the appointment of said Hallenbeck as Receiver of said South Ashland National Bank, plaintiff has filed his claims with said Receiver, demanding the payment of the amount of said check aforesaid, but the said defendant has refused to allow the amount of said claim and continues so to do. To the damage of the plaintiff in the sum of Fifteen Thousand Dollars ($15,000), and therefore he brings this suit.

III.

Plaintiff represents that on the 26th day of March, 1932, one James E. Hodgkinson, as Vice-President of Hodgkinson & Durfee, Inc., a corporation, drew its certain check upon the Central Manufacturing District Bank in the amount of Four Thousand Eight Hundred Seventy-two and 12/100 Dollars ($4,872.12), payable to the South Ashland National Bank, and on, to-wit, said date, delivered the said check to the said South Ashland National Bank, a copy of said check being attached hereto, marked Exhibit "C" and made a part hereof.

Plaintiff further represents that thereafter, on to-wit, the 23rd day of April, 1932, the said South Ashland National Bank deposited said check with the Federal Re-

serve Bank of Chicago for clearance against the account in that bank of the Central Manufacturing District Bank; that on, to-wit, April 25, 1932, said Federal Reserve Bank of Chicago charged the amount of said check against the account of the Central Manufacturing District Bank, and then and there credited the amount thereof to said South Ashland National Bank; thereafter, on to-wit, said date, the said Federal Reserve Bank of Chicago delivered said check to the Central Manufacturing District Bank.

Plaintiff further represents that on said 25th day of April, 1932, said Hodgkinson & Durfee, Inc., had no funds on deposit with the Central Manufacturing District Bank to cover the amount of said check aforesaid; that on said 25th day of April, 1932, the Central Manufacturing District Bank advised the said James E. Hodgkinson, who was then and there a Vice-President of the said South Ashland National Bank, that there were no funds in the account of Hodgkinson & Durfee, Inc. to cover the amount of said check, and that the check would, therefore, be dishonored; that on the morning of April 26, 1932, said check was presented on behalf of the Central Manufacturing Manufacturing District Bank to the cashier of the South Ashland National Bank and demand made on said South Ashland National Bank that it reimburse the Central Manufacturing District Bank for the amount that had been charged to its account through the Federal Reserve Bank of Chicago aforesaid; and the said South Ashland National Bank being so indebted then and there promised to pay the amount thereof to the Central Manufacturing District Bank; but the said South Ash-
12 land National Bank, through its officers, then and there refused so to do and continued so to do thereafter, until the appointment of the defendant as Receiver. Plaintiff further represents that since the appointment of said Hallenbeck as Receiver of said South Ashland National Bank, plaintiff has filed his claim with said Receiver, demanding the payment of the amount of said check aforesaid, but the said defendant has refused to allow the amount of said claim and continues so to do. To the damage of the plaintiff in the sum of Fifteen Thousand Dollars ($15,000), and therefore he brings this suit.

IV.

Plaintiff represents that on the 26th day of March, 1932, one James E. Hodgkinson, as Vice-President of Hodgkinson & Durfee, Inc., a corporation, drew its certain check

upon the Central Manufacturing District Bank in the amount of One Thousand Seven Hundred Eleven and 80/100 Dollars ($1,711.80), payable to the South Ashland National Bank, and on, to-wit, said date, delivered the said check to the South Ashland National Bank, a copy of said check being attached hereto, marked Exhibit "D" and made a part hereof.

Plaintiff further represents that thereafter, on to-wit, the 23rd day of April, 1932, the said South Ashland National Bank deposited said check with the Federal Reserve Bank of Chicago for clearance against the account in that bank of the Central Manufacturing District Bank; that on, to-wit, April 25, 1932, said Federal Reserve Bank of Chicago charged the amount of said check against the account of the Central Manufacturing District Bank, and then and
13 there the amount thereof to said South Ashland National Bank; thereafter, on to-wit, said date, the said Federal Reserve Bank of Chicago delivered said check to the Central Manufacturing District Bank.

Plaintiff further represents that on said 25th day of April, 1932, said Hodgkinson & Durfee, Inc. had no funds on deposit with the Central Manufacturing District Bank to cover the amount of said check aforesaid; that on said 25th day of April, 1932, the Central Manufacturing District Bank advised the said James E. Hodgkinson, who was then and there a Vice-President of the said South Ashland National Bank, that there were no funds in the account of Hodgkinson & Durfee, Inc. to cover the amount of said check, and that the check would, therefore, be dishonored; that on the morning of April 26, 1932, said check was presented on behalf of the Central Manufacturing District Bank to the cashier of the South Ashland National Bank and demand made on said South Ashland National Bank that it reimburse the Central Manufacturing District Bank for the amount that had been charged to its account through the Federal Reserve Bank of Chicago aforesaid; and the said South Ashland National Bank being so indebted then and there promised to pay the amount thereof to the Central Manufacturing District Bank; but the said South Ashland National Bank, through its officers, then and there refused so to do and continued so to do thereafter, until the appointment of the defendant as Receiver. Plaintiff further represents that since the appointment of said Hallenbeck as Receiver of said South Ashland National Bank, plaintiff has filed his claim with said Receiver, demanding the payment of the

amount of said check aforesaid, but the defendant has refused to allow the amount of said claim and continues so
14 to do. To the damage of the plaintiff in the sum of Fifteen Thousand Dollars ($15,000), and therefore he brings this suit.

V.

Plaintiff represents that on the 23rd day of April, 1932, one James E. Hodgkinson, as Vice-President of Hodgkinson & Durfee, Inc., a corporation, drew its certain check upon the Central Manufacturing District Bank in the amount of One Thousand Five Hundred Fifty Dollars ($1,550), payable to J. G. Hodgkinson and which was endorsed by him and who, on to-wit, said date, delivered the said check to the said South Ashland National Bank a copy of said check being attached hereto, marked Exhibit "E" and made a part hereof.

Plaintiff further represents that on, to-wit, the 23rd day of April, 1932, the said South Ashland National Bank deposited said check with the Federal Reserve Bank of Chicago for clearance against the account in that bank of the Central Manufacturing District Bank; that on, to-wit, April 25, 1932, said Federal Reserve Bank of Chicago charged the amount of said check against the account of the Central Manufacturing District Bank, and then and there credited the amount thereof to said South Ashland National Bank; thereafter, on to-wit, said date, the said Federal Reserve Bank of Chicago delivered said check to the Central Manufacturing District Bank.

Plaintiff further represents that on said 25th day of April, 1932, said Hodgkinson & Durfee, Inc. had no funds on deposit with the Central Manufacturing District Bank to cover the amount of said check aforesaid; that on said 25th day of April, 1932, the Central Manufacturing District Bank
15 advised the said James E. Hodgkinson, who was then and there a Vice-President of the said South Ashland National Bank, that there were no funds in the account of Hodgkinson & Durfee, Inc. to cover the amount of said check, and that the check would, therefore, be dishonord; that on the morning of April 26, 1932, said check was presented on behalf of the Central Manufacturing District Bank to the cashier of the South Ashland National Bank and demand made on said South Ashland National Bank that it reimburse the Central Manufacturing District Bank for the amount that had been charged to its account through the Federal

Reserve Bank of Chicago aforesaid; and the said South Ashland National Bank being so indebted then and there promised to pay the amount thereof to the Central Manufacturing District Bank; but the said South Ashland National Bank, through its officers, then and there refused to to do and continued so to do thereafter, until the appointment of the defendant as Receiver. Plaintiff further represents that since the appointment of said Hallenbeck as Receiver of said South Ashland National Bank, plaintiff has filed his claim with said Receiver, demanding the payment of the amount of said check aforesaid, but the said defendant has refused to allow the amount of said claim and continues so to do. To the damage of the plaintiff in the sum of Fifteen Thousand Dollars ($15,000), and therefore he brings this suit.

WINSTON STRAWN & SHAW
Attorneys for Plaintiff.

16 State of Illinois } ss.
County of Cook }

JAMES M. HOPKINS, JR., being duly duly sworn, on oath deposes and says that he is the agent in this behalf of W. F. Leimert, Receiver of the Central Manufacturing District Bank, plaintiff in the above entitled cause; that plaintiff's claim is based on five (5) checks totaling Thirteen Thousand Seven Hundred Thirty-three Dollars (13,733), drawn on the Central Manufacturing District Bank and delivered to the South Ashland National Bank (for which the defendant is acting as Receiver), and which said checks were paid to the South Ashland National Bank through clearing house banks from the funds of the Central Manufacturing District Bank at a time when the drawer of said checks had no funds on deposit with the Central Manufacturing District Bank to pay the amount thereof; that on the date said checks were presented to the Central Manufacturing District Bank, the South Ashland National Bank was notified that there were not sufficient sums to cover said checks and demanded the repayment thereof; that demand was also made upon the South Ashland National Bank on the morning following the afternoon on which said checks were presented to the Central Manufacturing District Bank, but that the repayment of the amount so paid to the South Ashland National Bank was, and has been continuously thereafter refused; that there is due and owing from defendant to the plaintiff,

after allowing the defendant all just credits, deductions and set-offs, the sum of Thirteen Thousand Seven Hundred Thirty-three Dollars ($13,733).

Further affiant sayeth not.

JAMES M. HOPKINS JR.

Subscribed and Sworn to before me this 6th day of April, A. D. 1933.

MAE E. BURGESS
Notary Public.

(Seal)

Copy

17 EXHIBIT A

Hodgkinson & Durfee
Incorporated
Insurance
175 West Jackson Blvd.

No. 11092
Chicago, March 26th 1932

Pay to the order of South Ashland Nat. Bank $3000.00
Three thousand dollars.....

HODGKINSON & DURFEE, INC.
JAMES E. HODGKINSON
Vice President

Central Manufacturing
District Bank
2-215 Chicago, Illinois 2-215

Endorsements:

Pay to the order of any bank or banker prior endorsements guaranteed Apr 25 1932 Federal Reserve Bank of 2-30 Chicago 2-30

Pay to the order of Federal Reserve Bank of Chicago (All Prior Endorsements Guaranteed) Apr 23, 1932 South Ashland National Bank 2-404 of Chicago, Ill. 2-404 Guy Brown, Cashier

18 EXHIBIT B

Hodgkinson & Durfee
Incorporated
Insurance
175 West Jackson Blvd.

No. 11093
Chicago, March 26th, 1932
Pay to the order of South Ashland Nat. Bank $2600.00
Twenty six hundred.....

HODGKINSON & DURFEE, INC.
JAMES E. HODGKINSON
Vice President

Central Manufacturing
District Bank
2-215 Chicago, Illinois 2-215
Endorsements:
First National Bank of Chicago Apr 25 1932 A. M.
Pay to the order of First National Bank Chicago All prior Endorsements Guaranteed South Ashland National Bank 2-404 Chicago, Ill. 2-404

19 EXHIBIT C

Hodgkinson & Durfee
Incorporated
Insurance
175 West Jackson Blvd.

No. 11091
Chicago, March 26th 1932
Pay to the order of South Ashland Nat. Bank $4872.12
Forty eight hundred & seventy-two dollars & twelve cents

HODGKINSON & DURFEE, INC.
JAMES E. HODGKINSON
Vice President

Central Manufacturing
District Bank
2-215 Chicago, Illinois 2-215
Endorsements:
Pay to the order of any bank or banker prior endorsements guaranteed Apr 25 1932 Federal Reserve Bank of Chicago 2-30 Chicago 2-30
Pay to the order of Federal Reserve Bank of Chicago (All Prior Endorsements Guaranteed) South Ashland National Bank 2-404 of Chicago, Ill. 2-404 Guy Brown, Cashier

20 EXHIBIT D.

Hodgkinson & Durfee
Incorporated
Insurance
175 West Jackson Blvd.

No. 11090
Chicago, March 26th, 1932
Pay to the order of South Ashland Nat. Bank $1711.80
Seventeen hundred and eleven dollars eighty
HODGKINSON & DURFEE, INC.
JAMES E. HODGKINSON
Vice President

Central Manufacturing
District Bank
2-215 Chicago, Illinois 2-215
Pay to the order of any bank or banker prior endorsements guaranteed Apr 25 1932 Federal Reserve Bank of Chicago 2-30 Chicago 2-30
Pay to the order of Federal Reserve Bank of Chicago (All Prior Endorsements Guaranteed) South Ashland National Bank 2-404 of Chicago, Ill. 2-04 Guy Brown, Cashier

21 EXHIBIT E.

Hodgkinson & Durfee
Incorporated
Insurance
175 West Jackson Blvd.

No. 11089
Chicago, April 23rd 1932
Pay to the order of J. G. Hodgkinson.....$1550.00
Fifteen hundred & fifty.....Dollars
HODGKINSON & DURFEE, INC.
JAMES E. HODGKINSON
Vice President

Central Manufacturing
District Bank
2-215 Chicago, Illinois 2-215
Endorsements:
J. E. Hodgkinson Pay to the order of any bank or banker prior endorsements guaranteed Apr 25 1932 Federal Reserve Bank of Chicago 2-30 Chicago 2-30
Pay to the order of Federal Reserve Bank of Chicago

(All Prior Endorsements Guaranteed) Apr 23 1932 South Ashland National Bank 2-404 of Chicago, Ill. 2-404 Guy Brown, Cashier.

Charles M. Bates Clerk.

(Endorsed) • • (Caption) • • Amended Declaration Filed Apr. 7 1933 Charles M. Bates Clerk Winston, Strawn & Shaw Attorneys at Law. Telephone Cen 4363 First National Bank Building Chicago.

Apr. 17. 23 And on, to wit, the 17th day of April, 1933, came the Defendant by his attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to-wit:

24 • • (Caption) • •

ANSWER.

And the Defendant, Harry E. Hallenbeck, Receiver of the South Ashland National Bank, by Ashcraft & Ashcraft, his attorneys, comes and defends the wrong and injury, when, etc., and says that he did not promise in manner and form as the plaintiff has above thereof complained against him and of this he puts himself upon the country, etc.

ASHCRAFT & ASHCRAFT,
Attorneys for Defendant.

25 State of Illinois, } ss.
County of Cook. }

RUSSELL F. LOCKE, being first duly sworn, on oath, deposes and says that he is the agent in this behalf of Harry E. Hallenbeck, Receiver of South Ashland National Bank, defendant in the above entitled cause: that the five checks, totalling Thirteen Thousand Seven Hundred Thirty-three Dollars ($13,733.00), drawn on the Central Manufacturing District Bank and delivered to the South Ashland National Bank, were delivered to the South Ashland National Bank and received by the South Ashland National Bank for a valuable consideration; that said checks were accepted by Central Manufacturing District Bank and paid by the said Central Manufacturing District Bank; that the said South Ashland National Bank, at the time said checks were presented for

payment by it to the Central Manufacturing District Bank, were not notified that there were not sufficient sums to cover said checks; that the said South Ashland National Bank had no knowledge, when the said checks were presented to the Central Manufacturing District Bank and paid by the Central Manufacturing District Bank, that the drawer of said checks had then no funds on deposit with the Central Manufacturing District Bank to pay the amount thereof; that there is not due and owing from the defendant to the plaintiff the sum of Thirteen Thousand Seven Hundred Thirty-three Dollars ($13,733.00), or any other sum whatsoever; that the South Ashland National Bank and the defendant, or either of them, has never promised to pay the amount of said
26 checks or any other sum whatsoever, to the Central Manufacturing District Bank.'

Further, affiant sayeth not.

RUSSELL F. LOCKE.

Subscribed and sworn to before me this 17th day of April, A. D. 1933.

(Seal)

ESTHER V. JOHNSON,
Notary Public.

27 And afterwards, to wit, on the 13th day of December, 1933, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to-wit:

Filed 1933.

Findings of Fact and Conclusions of Law.

28 • • (Caption) • •

THE FACTS:

This is a suit by the receivers of two banks, both located in the City of Chicago. The plaintiff is the receiver of the Central Manufacturing District Bank, hereinafter referred to as "The Central Bank." The defendant is the receiver of the South Ashland National Bank, hereinafter referred to as "The Ashland Bank." James E. Hodgkinson was, during March and April, 1932, a vice president of Hodgkinson & Durfee, Inc., hereinafter referred to as the corporation. Hodgkinson was also vice president, a director and the owner

of one-fourth (500 shares) of the capital stock of the Ashland Bank. The corporation maintained an account at the Central Bank. On March 26, 1932, Hodgkinson drew four checks of the corporation aggregating $12,183.92 on the Central Bank, payable to the order of the Ashland Bank and, on that date, delivered the checks to the Ashland Bank. On April 23, 1933, Hodgkinson drew the check of the corporation upon the Central Bank for $1,550.00, payable to Hodgkinson personally and on the same date he delivered the check by him endorsed to the Ashland Bank.

During the entire month of April, 1932, the Federal Reserve Bank of Chicago and the First National Bank of Chicago were regular members of the Chicago Clearing House Association and the Central Bank was an affiliated member of the association. The Ashland Bank was neither a member of nor affiliated with the Chicago Clearing House Association. The four checks, dated March 26, 1932, and aggregating $12,183.92 were carried on the books of the Ashland Bank as the assets of that bank. On Saturday, April 23, 1932, four of these checks were deposited by the Ashland Bank in the Federal Reserve Bank of Chicago and the fifth check (in the amount of $2600.00) was forwarded to the First National Bank of Chicago for collection. Nothing further happened to these checks until Monday morning, April 25, 1932. Early on Monday morning the four checks sent to the Federal Reserve Bank for collection were turned in to the Chicago Clearing House Association by the Federal Reserve Bank. In accordance with the rules and practices of the clearing house the Central Bank, by its check, paid the amount of this check and took checks to the Federal Reserve Bank of Chicago. On the same day and before 11:30 A. M. the messenger of the Chicago Clearing House Association delivered to the Central Bank the four checks in question. It was some time after noon, several hours after its "clearing house balance" had been settled before any one in the Central Bank learned that the payment of these four checks would create an overdraft in the corporation's account. On that day the corporation had a balance in the Central Bank of $9.85.

The check for $2600.00 was deposited for collection by the Ashland Bank in the First National Bank of Chicago and never was presented at the clearing house. The First National Bank carried an account of the Central Bank as well as one for the Ashland Bank. Instead of sending this check to the clearing house it charged the amount of this check to the Central Bank and credited it to the account of the Ash-

land Bank. This check was then sent out by messenger to the Central Bank and arrived there some time after noon. When the Central Bank learned, of the overdraft that had been caused in the corporation's account, if these five checks were paid, the Central Bank notified Hodgkinson and before the close of business on the next day—in fact by 9:30 in the morning of the next day—the Central Bank returned the checks to the Ashland Bank and demanded reimbursement. This was refused by the Ashland Bank. The Ashland Bank itself got and kept all of the proceeds of these five checks.

On April 23, 1932, a rule of the Chicago Clearing House (Rule 14) was in force which, so far as pertinent, reads as follows:

"In order that the member banks presenting such items may have an opportunity to give special instructions as to the protest of unpaid items, that notice of non-payment of any such items drawn on banks * * * which are * * * affiliated with members of the association * * * and which have their places of business located * * * on 12th Street or south thereof, be given by telephone before two-thirty o'clock (2:30) P. M. of the same day to the member banks presenting such items through the Clearing House * * *"

31 The defendant maintains as an affirmative defense that there was an agreement by the Central Bank to permit overdrafts of the corporation or to make a loan to the corporation.

Frank L. Webb was executive vice president, Harold P. Johnson was assistant vice president and Thomas Kekich was assistant cashier and auditor during March and April, 1932, of the Central Bank.

James E. Hodgkinson testified that on March 26, 1932, he had a conversation with Webb at the depositors bank of which he was receiver in which he told Webb that he, Hodgkinson, would need $15,000.00 and that Webb said that he would make the loan in the Central Bank and that Hodgkinson could issue checks against it. Between that date and April 22, 1932, Hodgkinson seems to have had several conversations with Webb but nothing definite concerning the loan. On Friday, April 22, 1932, Hodgkinson testified that he had a telephone conversation with Webb in which he told Webb that the checks payable to the Ashland Bank on the Central Bank were going through and that he, Webb, would have to make the loan that day. Webb replied, "Well, you go out to the stock yards and see the boys and get it fixed up, that will take care of you." He also testifies that on the same day he had a con-

versation with Johnson in the Central Bank in which he told Johnson that the checks were going through and in which he discussed the collateral that Johnson wanted for the loan.

He further testified that he gave Johnson 99 shares of the
32 Ashland Bank stock which Johnson put in his pocket. This stock, according to Hodgkinson, was to go as collateral to the loan. On Saturday, April 23, 1932, Hodgkinson testifies that he had a conversation with Johnson and Kekich at the Bank in which he discussed the checks coming through and brought the rest of the collateral out and showed it to Johnson and Kekich. Neither Johnson nor Kekich stated they would not make the loan. Hodgkinson testifies that on Monday, April 25, 1932, he called Webb at the Terminal Bank and told him the checks were at the Central Bank to which Webb said, "Go out there and fix it up with the boys." About one o'clock on that day (Monday) Hodgkinson testifies that he went to the Central Bank with his brother, Francis, where he talked with Johnson and Kekich about the collateral for the loan. In that conversation he was not told that the loan would not be made. Webb, Johnson and Kekich, categorically, deny the substance of the testimony of Hodgkinson in so far as their activities are concerned.

CONCLUSION:

Upon the above and foregoing statement of facts, the court concludes:

(1) The checks in question were not paid by the Central Bank on April 23, 1932.

(2) The action of the First National Bank in charging the account of the Central Bank and in crediting the account of the Ashland Bank with the proceeds of the check of $2600.00 did not constitute payment of said check.

33 (3) The notice given by the Central Bank to the Ashland Bank on Monday, April 25, 1932, was in compliance with Section 102 of the Negotiable Instruments Law and fixed the liabilities of the Ashland Bank to reimburse the Central Bank for the amount of the checks.

(4) The Central Bank did not agree with James E. Hodgkinson to make a loan of $15,000.00 or any other sum, either to Hodgkinson personally, or to Hodgkinson & Durfee, Inc., and did not agree to honor the overdrafts either of Hodgkinson personally, or of Hodgkinson & Durfee, Inc.

(5) The court finds the issues for the plaintiff.

(6) Judgment should be entered in favor of the plaintiff

and against the defendant in the sum of $_____ and costs of suit.

Enter:

CHARLES E. WOODWARD,
Judge.

Dated December 13, 1933.

43 And afterwards, to wit, on the 16th day of February, 1934, nunc pro tunc as of December 13, 1933, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

Filed Fe 1934, n pro tu of Dec 1933.

Findings of Fact and Conclusions of Law.

44 * * (Caption) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This Cause Coming on to Be Heard before the undersigned Judge of the above named court, sitting as Judge of Law and Fact, a jury having been waived and it being stipulated between the parties hereto that the decision to be made herein should be predicated upon special findings of fact which the court is requested to make, and the court, upon due consideration of the competent evidence herein and the stipulation of the parties hereto, does find the facts to be as follows:

1. The plaintiff is the Receiver of the Central Manufacturing District Bank and the defendant is the Receiver of the South Ashland National Bank.

2. One James G. Hodgkinson was, during the months of March and April, A. D. 1932, a vice president of a corporation of the name, Hodgkinson & Durfee, Inc., Hodgkinson was also vice president and director and owner of one-fourth of the capital stock of the South Ashland National Bank.

45 3. The corporation, Hodgkinson & Durfee, Inc., maintained an account at the Central Manufacturing District Bank.

4. On March 26, 1932, James G. Hodgkinson drew four checks of the corporation, Hodgkinson & Durfee, Inc., aggregating Twelve Thousand One Hundred Eighty-three and 92/100ths Dollars ($12,183.92), on the Central Manufacturing

District Bank, payable to the order of the South Ashland National Bank, and on that date delivered the checks to the said South Ashland National Bank. On April 23, 1932, James G. Hodgkinson drew the check of the corporation, Hodgkinson & Durfee, Inc., upon the Central Manufacturing District Bank for One Thousand Five Hundred Fifty Dollars ($1,550.00) payable to the said Hodgkinson, personally, and on the same date Hodgkinson delivered the check, by him endorsed, to the South Ashland National Bank.

5. During the entire month of April, 1932, the Federal Reserve Bank of Chicago and the First National Bank of Chicago were regular members of the Chicago Clearing House Association, and the Central Manufacturing District Bank was an affiliate member of the Association. The South Ashland National Bank was neither a member of, nor affiliated with, the Chicago Clearing House Association.

6. The four checks drawn by Hodgkinson, dated March 26, 1932, and aggregating Twelve Thousand One Hundred Eighty-three and 92/100ths Dollars ($12,183.92), were 46 carried on the books of the South Ashland National Bank as assets of that bank.

7. On Saturday, April 23, 1932, four of these checks were deposited by the South Ashland National Bank in the Federal Reserve Bank of Chicago and the fifth check, in the amount of Two Thousand Six Hundred Dollars ($2,600.00), was forwarded to the First Natioinal Bank of Chicago for collection. Nothing further happened to these checks until Monday morning, April 25, 1932.

8. Early on Monday morning, the four checks sent to the Federal Reserve Bank for collection were turned in to the Chicago Clearing House Association by the Federal Reserve Bank, and in accordance with the rules and practices of the Chicago Clearing House Association, the Central Manufacturing District Bank, by its check, paid the amount of these checks and took its check to the Federal Reserve Bank of Chicago, and on the same day and before 11:30 o'clock A. M., the messenger of the Chicago Clearing House Association delivered to the Central Manufacturing District Bank the four checks in question.

9. It was some time after noon, several hours after its "Clearing House Balance" had been settled, before anyone in the Central Manufacturing District Bank learned that the payment of these four checks would create an overdraft in the account of Hodgkinson & Durfee, Inc., because on that day Hodgkinson & Durfee, Inc., had a balance in the Central

Manufacturing District Bank of Nine and 85/100ths Dollars ($9.85).

10. The check for Two Thousand Six Hundred Dol-
47 lars ($2,600.00) was deposited for collection by the South Ashland National Bank in the First National Bank of Chicago and never presented at the Chicago Clearing House Association.

11. The First National Bank of Chicago carried an account of the Central Manufacturing District Bank as well as an account for the South Ashland National Bank.

12. Instead of sending this check to the Chicago Clearing House Association, the First National Bank of Chicago charged the amount of this check to the Central Manufacturing District Bank and credited to the account of the South Ashland National Bank and the check so charged to the Central Manufacturing District Bank was then sent by messenger to the Central Manufacturing District Bank and arrived there some time after noon on the same day.

13. When the Central Manufacturing District Bank learned of the overdraft that had been caused in the account of Hodgkinson & Durfee, Inc., if these five checks were paid, the Central Manfacturing District Bank notified Hodgkinson.

14. At 9:30 o'clock A. M. of the next day, the Central Manufacturing District Bank returned the checks to the South Ashland National Bank and demanded reimbursement which was refused by the South Ashland National Bank.

15. The South Ashland National Bank got and kept all of the proceeds of these five checks.

16. On April 23, 1932, a rule of the Chicago Clearing
48 House Association (Rule 14) was in force, which, so far as pertinent, reads as follows:

"In order that the member banks presenting such items may have an oppoprtunity to give special instructions as to the protest of unpaid items, that notice of non-payment of any such items drawn on banks * * * which are * * * affiliated with members of the association * * * and which have their places of business located * * * on 12th Street, or south thereof, be given by telephone before two-thirty o'clock (2:30) P. M. of the same day to the member banks presenting such items through the Clearing House * * *."

17. Frank L. Webb was executive vice president, Harold P. Johnson was assistant vice president and Thomas Kekich was assistant cashier and auditor during March and April, 1932, of the Central Manufacturing District Bank.

18. The Central Manufacturing District Bank did not

agree with James G. Hodgkinson to make a loan of Fifteen Thousand Dollars ($15,000.00) or any other sum, either to Hodgkinson, personally, or to Hodgkinson & Durfee, Inc., and did not agree to honor the overdrafts either of Hodgkinson, personally, or of Hodgkinson & Durfee, Inc.

CONCLUSIONS OF LAW.

The court finds and declares the following conclusions of law upon the foregoing facts:

1. The checks in question were not paid by the Central Manufacturing District Bank on April 23, 1932.
2. The action of the First National Bank of Chicago in charging the account of the Central Manufacturing Dis-
49 trict Bank and in crediting the account of the South Ashland National Bank with the proceeds of the check of Two Thousand Six Hundred Dollars ($2,600.00) did not constitute payment of said check.
3. The notice given by the Central Manufacturing District Bank to the South Ashland National Bank on Monday, April 25, 1932, was in compliance with Section 102 of the Negotiable Instruments Law and fixed the liability of the South Ashland National Bank to reimburse the Central Manufacturing District Bank for the amount of the checks.
4. The Central Manufacturing District Bank did not agree with James G. Hodgkinson to make a loan of Fifteen Thousand Dollars ($15,000.00) or any other sum, either to Hodgkinson, personally, or to Hodgkinson & Durfee, Inc., and did not agree to honor the overdrafts either of Hodgkinson, personally, or of Hodgkinson & Durfee, Inc.
5. The Court finds the issues for the plaintiff.
6. Judgment should be entered in favor of the plaintiff and against the defendant in the sum of Fourteen Thousand Eight Hundred Sixty-four and 56/100ths Dollars ($14,864.56) and costs of suit.

The defendant's several exceptions to each and all of the foregoing conclusions of law declared by the court are severally noted.

The above is hereby ordered to be filed nunc pro tunc as of December 13th, 1933, and made a part of the record of this cause.

Enter:

CHARLES E. WOODWARD,
Judge.

Entered nunc pro tunc as of December 13th, 1933.

50 And afterwards, to wit, on the 16th day of February, 1934, nunc pro tunc as of December 13, 1933, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

Entered 16, 193 nunc pr tunc as Dec. 13,

51 • • (Caption) • •

This Cause Coming On To Be Heard upon the motion of the defendant herein, by Ashcraft & Ashcraft, his solicitors, and it appearing that the above cause was tried before this court on stipulation between the parties that a jury be waived and the issues be tried by the court without a jury and a trial of the issues of this cause having been had and the court having heretofore, on the 13th day of December, 1933, made certain findings of fact herein with its conclusions of law thereon, which findings of fact and conclusions of law were embodied in the Opinion of the court announced and filed in this cause, and it appearing that said findings of fact and said conclusions of law may be insufficient in form and may not appear as a part of the record of this cause;

It Is Hereby Ordered that a finding of facts in this cause with the conclusions of law of the court thereupon, conformable to the Opinion of the court heretofore filed herein, be prepared, and

It Appearing that a finding of facts with the conclusion
52 of law of the court thereupon, conformable to the Opinion of the court herein, heretofore filed, has been prepared and is presented herewith, and the court having examined the same and it appearing that they are the findings of fact and the conclusions of law heretofore made by the court on the 13th day of December, 1933;

It Is Hereby Ordered that said findings of fact and conclusions of law presented herewith be filed nunc pro tunc as of December 13th, 1933, and made a part of the record of this cause.

Enter:
CHARLES E. WOODWARD,
Judge.

Entered nunc pro tunc as of December 13th, 1933.

red Dec. 1933.

34 And afterwards, to wit, on the 29th day of December, 1933, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

Order For Judgment.

35 • • (Caption) • •

ORDER FOR JUDGMENT.

This cause having come on to be heard by the Court and a jury having been waived by both parties hereto and testimony having been taken and witnesses examined on behalf of both parties, and Winston, Strawn & Shaw, Attorneys for the plaintiff, and Ashcraft and Ashcraft, Attorneys for the defendant, having been duly heard and due deliberation having been had, the Court, being now fully advised in the premises, finds the issues for the plaintiff and assesses his damages at the sum of Fourteen Thousand Eight Hundred Sixty-four Dollars and Fifty-six Cents ($14,864.56), and it is hereby ordered that the Clerk of this Court enter judgment on said finding in favor of the plaintiff and against the defendant for said sum of Furteen Thousand Eight Hundred Sixty-four Dollars and Fifty-six Cents ($14,864.56), with costs of suit.

Enter:

CHARLES E. WOODWARD,
Judge.

Dated December 29, 1933.

1 Feb. 7, 34.

36 And on, to wit, the 7th day of February, 1934 came the Defendant by his attorneys and filed in the Clerk's office of said Court a certain Petition for Appeal in words and figures following, to wit:

37 • • (Caption) • •

PETITION FOR APPEAL.

Now Comes, Harry E. Hallenbeck, Receiver of South Ashland National Bank, defendant herein, and says that on the 29th day of December, A. D. 1933, this Court entered a judg-

ment herein in favor of the plaintiff, W. F. Leimert, Receiver of Central Manufacturing District Bank, and against this defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were made to the prejudice of this defendant, all of which will more fully appear from the Assignment of Errors which is filed with this Petition.

Wherefore, this defendant prays an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, for the correction of errors so complained of and that a transcript of the record, proceedings and papers in said cause, duly authenticated may be sent to the said Circuit Court of Appeals.

ASHCRAFT & ASHCRAFT,
Attorneys for Defendant.

38 And on, to wit, the 7th day of February, 1934 came the Defendant by his attorneys and filed in the Clerk's office of said Court a certain Assignment of Errors in words and figures following, to wit: Filed Feb 1934.

39 • • (Caption) • • •

ASSIGNMENT OF ERRORS.

Now Comes, Harry E. Hallenbeck, Receiver of South Ashland National Bank, defendant in the above entitled cause, and assigns errors in the trial and decision of said District Court in said cause as follows:

1. Said court erred in overruling defendant's motion to find the issues for the defendant, made at the close of plaintiff's case.

2. Said court erred in concluding that the checks in question were not paid by the Central Bank on April 23, 1932.

3. Said court erred in concluding that the checks in question were not paid by the Central Bank on April 25, 1932.

4. Said court erred in concluding that the action of the First National Bank in charging the account of the Central Bank and in crediting the account of the Ashland Bank with the proceeds of the check of Two Thousand Six Hundred Dollars ($2600.00), did not constitute payment of said check.

40 5. Said court erred in concluding that the notice given by Central Bank to the Ashland Bank on Monday, April

25, 1932, was in compliance with Section 102 of the Negotiable Instruments Law, and fixed the liability of the Ashland Bank to reimburse the Central Bank for the amount of the checks.

6. Said court erred in finding the issues for the plaintiff.

7. Said court erred in concluding judgment should be entered in favor of the plaintiff and against the defendant in the sum of Fourteen Thousand Eight Hundred Sixty Four and 56/100ths Dollars ($14,864.56) and costs of suit.

ASHCRAFT & ASHCRAFT,
Attorneys for Appellant, Harry E. Hallenbeck, Receiver of South Ashland National Bank.

Filed Feb. 7, 34.

41 And afterwards, to wit, on the 7th day of February, 1934, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge appears the following entry, to wit:

ORDER.

42 • • (Caption) • •

Order

Comes now, the defendant, by Ashcraft & Ashcraft, his attorneys, and also came the plaintiff, by Winston, Strawn & Shaw, his attorneys, and thereupon the defendant filed herein and presented to the Court his Petition for an appeal to the Circuit Court of Appeals of the United States for the Seventh Judicial Circuit, and also an Assignment of Errors intended to be urged by him, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, would be sent to said Circuit Court of Appeal and that such other and further proceedings may be had herein as may be proper in the premises;

On consideration whereof, the Court does allow an appeal herein to the United States Circuit Court of Appeals for the Seventh Judicial Circuit;

Dated February 7-1934.

CHARLES E. WOODWARD,
Judge.

53 (Caption)

Filed Feb. 1934.

NOTICE.

To The Clerk of Said Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the 7th Judicial Circuit, pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record the following papers and matters of record in said cause, to-wit:

Placita,
Summons and Return,
Amended Declaration;
Answer and Affidavit of Defense,
Findings of Fact and Conclusions by the court dated December 13th, 1933,
Order for Judgment,
Petition for Appeal,
Assignment of Errors,
Order Allowing Appeal,

54 Order entered February 16, 1934 that Findings of Fact with Conclusions of Law be prepared and filed nunc pro tunc as of December 13th, 1933 and made part of record,
Findings of Fact and Conclusions of Law entered February 16, 1934 nunc pro tunc as of December 13th, 1933,
Citation.

Respectfully,
ASHCRAFT & ASHCRAFT,
Attorneys for Appellant.

Service of the above praecipe accepted and acknowledged this 16th day of February, A. D. 1934.

WINSTON, STRAWN & SHAW,
Attorneys for Appellee.

Endorsed: Filed February 20, 1934 Charles M. Bates, Clerk.

55 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete

transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled W. F. Leimert, Receiver Central Manufacturing District Bank vs. Harry E. Hallenbeck, Receiver of South Ashland National Bank, No. 41749 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 27th day of February, A. D. 1934.

CHARLES M. BATES,
Clerk.

(Seal)

56 United States of America } ss.

The President of the United States, To W. F. Leimert, Receiver of Central Manufacturing District Bank, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to order granting appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Harry E. Hallenbeck, Receiver of South Ashland National Bank, is Appellant and you are Appellee to show cause, if any there be, why the judgment rendered against the said Appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Woodward, Judge of the District Court of the United States, this 7th day of February, in the year of our Lord one thousand nine hundred and thirty four.

CHARLES E. WOODWARD,
U. S. District Judge.

Service of a copy of the foregoing citation is acknowledged this 15th day of February, 1934.

WINSTON, STRAWN & SHAW,
Attorneys for W. F. Leimert, Receiver of Central Manufacturing District Bank.

(Endorsed:) • • (Caption) • • Citation Filed Feb 20 1934 Charles M. Bates Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 28, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the sixteenth day of March, 1934, on which the following entitled cause was heard and determined:

Harry E. Hallenbeck, Receiver of South Ashland National Bank,

Appellant,

vs.

W. F. Leimert, Receiver of Central Manufacturing District Bank,

Appellee,

No. 5185, October Term, 1934, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of October, A. D. 1934.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hunderd and Fifty-Eighth.

Harry E. Hallenbeck, Receiver of South Ashland National Bank,
5185 *vs.*
W. F. Leimert, Receiver of Central Manufacturing District Bank.

Appeal from the District Court of the United States for the Northern District of Illinois; Eastern Division.

And afterwards, to-wit: On the fifth day of March, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5185. October Term, 1933.

Harry E. Hallenbeck, Receiver of South Ashland National Bank,

Appellant,

vs.

W. F. Leimert, Receiver of Central Manufacturing District Bank,

Appellee.

The clerk will enter my appearance as counsel for appellant.

CARROLL J. LORD,
134 So. La Salle St.,
Chicago, Illinois.

Endorsed: Filed March 5, 1934. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the seventh day of March, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5185. October Term, 1933.

Harry E. Hallenbeck, Receiver of South Ashland National Bank,

Appellant,

vs.

W. F. Leimert, Receiver of Central Manufacturing District Bank,

Appellee.

The clerk will enter my appearance as counsel for appellee.

DANIEL M. HEALY,
111 W. Washington St.,
Chicago, Illinois.

Endorsed: Filed March 7, 1934. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fourth day of May, 1934, there was filed in the office of the clerk of this court, a Notice to add cause to April Calendar, which said Notice is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

April Term, A. D. 1934.

Harry E. Hallenbeck, Receiver of South Ashland National Bank, *Appellant,*
vs.
W. F. Leimert, Receiver of Central Manufacturing District Bank, *Appellee.*
} No. 5185.

To Daniel M. Healy, 111 W. Washington St., Chicago, Attorney for Appellee:

Please Take Notice that on Friday, the 4th day of May, A. D. 1934, at the hour of 10 o'clock A. M., or as soon thereafter as the cause cay be heard, we shall appear before the Honorable Samuel Alschuler, one of the Judges of the above entitled Court, in Room 752 of the Federal Building, Chicago, and shall ask that the above entitled cause be set for hearing on the April calendar of this Court, at which time and place you may appear if you so see fit.

ASHCRAFT & ASHCRAFT,
Attorneys for Appellant.

Received a copy of the foregoing notice, this 2nd day of May, A. D. 1934.

DANIEL M. HEALY,
Attorney for Appellee.

Endorsed: Filed May 4, 1934. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the fourth day of May, 1934, the following further proceedings were had an entered of record, to-wit:

Friday, May 4, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.

Harry E. Hallenbeck, Receiver, etc.
5185 *vs.*
W. F. Leimert, Receiver, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, It is now here ordered that this cause be, and the same is hereby set down for hearing on May 16, 1934.

And afterwards, to-wit: On the sixteenth day of May, 1934, the following further procedeings were had and entered of record, to-wit:

Wednesday, May 16, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Harry E. Hallenbeck, Receiver, etc.
5185 *vs.*
W. F. Leimert, Receiver, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Russell F. Locke, counsel for appellant, and by Mr. Daniel M. Healy, counsel for appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the thirtieth day of June, 1934, there was filed in the office of the clerk of this court, the opinion of the court, which said opinion is in the words and figures following:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5185. October Term, 1933, April Session, 1934.

Harry E. Hallenbeck, Receiver of South Ashland National Bank, *Appellant*,
vs.
W. F. Leimert, Receiver of Central Manufacturing District Bank, *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

June 30, 1934.

Before ALSCHULER, SPARKS, and FITZHENRY, *Circuit Judges*.

FITZHENRY, *Circuit Judge*. Appellant is the receiver of the South Ashland National Bank and appellee the receiver of the Central Manufacturing District Bank. For convenience, the two banks will hereafter be referred to as the "Ashland Bank" and the "Central Bank." The action was brought by the receiver of the Central Bank to recover moneys procured by the Ashland Bank by depositing for collection five checks aggregating $13,733.00. A jury was waived and the trial court made findings of fact and conclusions of law and entered judgment against the defendant for $14,864.56, from which this appeal was taken. No bill of exceptions was signed and we are therefore limited on this appeal to the question of whether the findings of fact, which were made a part of the record, justify the judgment.

The trial court found that one James E. Hodgkinson was,

during March and April, 1932, a vice president of Hodgkinson & Durfee, Inc., and also vice president, a director, and owner of one-fourth of the stock, of the Ashland Bank. Hodgkinson & Durfee had an account at the Central Bank. On March 26, 1932, Hodgkinson drew four checks of the corporation, aggregating $12,183.92, on the Central Bank, payable to the order of the Ashland Bank, and delivered them to the Ashland Bank on the same day. On April 23, 1932, Hodgkinson drew an additional check of the corporation upon the Central Bank for $1,550.00, payable to himself, and on the same day he endorsed and delivered the check to the Ashland Bank. The four checks of March 26, 1932, were carried on the books of the Ashland Bank as assets of the bank until Saturday, April 23, 1932, when three of them and the one dated April 23, 1932, were deposited in the Federal Reserve Bank of Chicago. The fifth check, for $2600.00, dated March 26, 1932, was forwarded to the First National Bank of Chicago for collection. Early on Monday morning, April 25, 1932, the four checks sent to the Federal Reserve Bank for collection were turned in to the Chicago Clearing House Association by the Federal Reserve Bank. In accordance with the rules of the Clearing House the Central Bank, by its check, settled the balance due the Clearing House, and received the checks in question deposited with the Federal Reserve Bank of Chicago, about 11:30 A. M., from a messenger of the Chicago Clearing House Association. Some time early in the afternoon, but after the "Clearing House" balance had been settled, the Central Bank learned that the payment of these checks would create an overdraft in the account of Hodgkinson & Durfee.

The check for $2,600.00 was never presented at the Clearing House. The First National Bank, to which it was sent for collection by the Ashland Bank, carried an account of the Central Bank as well as the Ashland Bank. It charged the amount of this check to the Central Bank and credited it to the account of the Ashland Bank and sent the check out by messenger to the Central Bank some time after noon. As soon as the Central Bank learned of the overdraft that would be caused in the corporation's account if these five checks were paid, it notified, Hodgkinson by telephone and, at 9:30 o'clock the next morning, returned the checks to the Ashland Bank and demanded reimbursement. This was refused by the bank, which had received and kept the proceeds of the five checks.

During this time, the Federal Reserve Bank of Chicago and

the First National Bank of Chicago were members of the Chicago Clearing House Association, while the Central Bank was an affiliated member of the association. A rule of the Chicago Clearing House Association in force at that time reads:

> "In order that the member banks presenting such items may have an opportunity to give special instructions as to the protest of unpaid items, that notice of non-payment of any such items drawn on banks * * * which are * * * affiliated with members of the association * * * and which have their places of business located * * * on 12th Street or south thereof, be given by telephone before two-thirty o'clock (2:30) P. M. of the same day to the member banks presenting such items through the Clearing House * * *."

Upon these facts the trial court found that the checks in question were not paid by the Central Bank on April 23, 1932, and appellant assigns this as error. It is conceded by both parties that if payment were actually made by the bank on which the checks were drawn (in this case the Central Bank) or if, instead of actual payment, an unconditional credit had been given, then, though it were later discovered that there were insufficient funds on deposit in the account of the maker to cover the checks, the payment would be absolute and irrevocable. The fact that the Central Bank gave its check in settlement of the Clearing House balance and that the four checks went to make up a portion of this balance, does not in itself constitute final and irrevocable payment. Neither did the exchange of credits on the books of the First National Bank constitute final and irrevocable payment by the Central Bank of the checks there in question. Brady on Bank Checks (2nd Ed.) 502; *Schneider* v. *Bank of Italy*, 194 Pac. 1021; *Columbia-K. Trust Co.* v. *Miller*, 215 N. Y. 191; *Hentz* v. *National City Bank*, 144 N. Y. 979. The method of transacting business followed by the Clearing House Association contemplates that the members will immediately examine the various items which go to make up the balance and only the subsequent lapse of time without electing to dishonor the check causes the settlement to become final. In the case of members of the Clearing House, the time within which notice must be given is fixed by agreement. In the case of banks not members of the Clearing House, the provisions of the Negotiable Instruments law must govern as to what length of time may elapse before the tentative payment becomes final and irrevocable.

Appellant argues that since the Central Bank never returned the checks to the Clearing House and made no attempt to hold the Clearing House Association, the Federal Reserve Bank or the First National Bank accountable, the Clearing House settlement became final upon the lapse of time fixed by the rules. We cannot agree with this position. The Ashland Bank was not a member of, or affiliated with, the Clearing House Association and is vested with no rights based upon its rules. 1 Morse on Banks and Banking (6th Ed.) 810; *National Exchange Bank* v. *Ginn & Co.*, 114 Md. 181; Brady on Bank Checks (2nd Ed.) 503; 8 Michie on Banks and Banking, 165. In this respect the case is distinguishable from *Preston* v. *Canadian Bank of Commerce*, 23 F. 179.

The Central Bank having elected to recover from the Ashland Bank directly, all that was necessary to bring the giving of notice of dishonor within the provisions of the Negotiable Instruments Law was that notice be given "before the close of business hours on the day following." (Cahill's Ill. Rev. Stat. 1933, Chap. 98, Sec. 124.) In the instant case the checks were tendered back to the Ashland Bank and demand for reimbursement made when the bank opened on the day following. The District Court properly held that the checks in question were not paid by the Central Bank on April 23, 1932. The notice given by the Central Bank to the Ashland Bank was in compliance with the terms of the Negotiable Instruments Law and the Ashland Bank was properly held liable to reimburse the Central Bank for the amount of the checks.

The judgment of the District Court is

AFFIRMED.

Endorsed: Filed June 30, 1934. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the thirtieth day of June, 1934, the following further proceedings were had and entered of record, to-wit:

Saturday, June 30, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Harry E. Hallenbeck, Receiver of South Ashland National Bank,
5185 *vs.*
W. F. Leimert, Receiver of Central Manufacturing District Bank.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs, and interest from the date of the judgment of said District Court until paid, at the same rate that similar judgments bear in the Courts of the State of Illinois.

And afterwards, to-wit: On the twentieth day of July, 1934, there was filed in the office of the clerk of this court, a petition for a rehearing, which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the twenty-eighth day of September, 1934, the following further proceedings were had and entered of record, to-wit:

Friday, September 28, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Harry L. Hallenbeck, Receiver, etc.
5185 *vs.*
W. F. Leimert, Receiver, etc.

} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the twenty-ninth day of September, 1934, the folowing further proceedings were had and entered of record, to-wit:

Saturday, September 29, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. William M. Sparks, Circuit Judge.

Harry E. Hallenbeck, Receiver, etc.
5185 *vs.*
W. F. Leimert, Receiver, etc.

} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes counsel for appellant and presents a motion for a stay of the Mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

On Consideration Whereof: It is now here ordered that the Mandate in this cause be, and the same is hereby stayed until the further order of this court.

It is further ordered that counsel for appellant proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and, upon the filing of said petition file in this court proof of the filing of said petition in said court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 31 to 40, inclusive, contain a true copy of the proceedings had and papers filed (excepting briefs of counsel and stipulations and orders pertaining to the filing thereof, and the petition for a rehearing and the answer thereto, in the case of

Harry E. Hallenbeck, Receiver of South Ashland National Bank,

Appellant,

vs.

W. F. Leimert, Receiver of Central Manufacturing District Bank,

Appellee,

No. 5185, October Term, 1934, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of October, A. D. 1934.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 21, 1935.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 600

HARRY E. HALLENBECK, RECEIVER OF SOUTH ASHLAND NATIONAL BANK,

Petitioner,

vs.

W. F. LEIMERT, RECEIVER OF CENTRAL MANUFACTURING DISTRICT BANK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

WALTER T. FISHER,
Attorney for Petitioners.

RAYMOND M. ASHCRAFT,
CARROLL J. LORD,
RUSSELL F. LOCKE,
RUFUS D. BEACH,
Of Counsel.

THE BLAKEMORE-WARNER PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. _____

HARRY E. HALLENBECK, RECEIVER OF SOUTH ASHLAND NATIONAL BANK,

Petitioner,

vs.

W. F. LEIMERT, RECEIVER OF CENTRAL MANUFACTURING DISTRICT BANK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry E. Hallenbeck, receiver of South Ashland National Bank, respectfully represents:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The respondent, W. F. Leimert, Receiver of Central Manufacturing District Bank, filed suit in the District Court for the Northern District of Illinois, to recover the amount

paid on five checks, aggregating $13,733 (Rec., 2-11). The cause was tried before the District Judge, sitting without a jury, and special findings of fact and conclusions of law were made and filed of record by the court (Rec., 19-22). The facts as found by the court are substantially as follows:

The petitioner, the Ashland Bank, was the payee or endorsee of five checks drawn on the respondent, the Central Bank, aggregating $13,733 (Rec., 19-20). The Ashland Bank endorsed one check without qualification (Rec., 12) and deposited it in the First National Bank of Chicago, where both the Central Bank and the Ashland Bank maintained accounts (Rec., 20-21). The First National Bank credited the Ashland Bank and debited the Central Bank for the amount of the check. The check was then sent by messenger to the Central Bank and arrived there some time after noon of the same day. The Central Bank received the check and although its payment would create an overdraft in the drawer's account did not return it to the First National Bank that day, or in fact, at any time thereafter, and never made a claim against the First National Bank for a cancellation of the debit to its account. The next morning, the Central Bank, presented the check at the Ashland Bank and demanded reimbursement for the amount charged to the account of the Central Bank in the First National Bank, which demand was refused (Rec., 21).

The other four checks were endorsed by the Ashland Bank without qualification (R. 11-14) and deposited in the Federal Reserve Bank of Chicago (Rec., 20). The Federal Reserve Bank was a member of, and the Central Bank an affiliated member of the Chicago Clearing House Association. The Ashland Bank was neither a member, nor an affiliated member (R. 20). A rule of the Clearing House in force at that time provided that in order that the member banks presenting checks for payment through the Clearing

House might have an opportunity to give special instructions as to the protest of unpaid items, notice of nonpayment of any such items drawn on the affiliated member banks be given by telephone before 2:30 P. M. of the same day to the member bank presenting such items through the Clearing House (Rec., 21). The Federal Reserve Bank presented the four checks to the Central Bank for payment through the Clearing House. The Central Bank received these checks about 11:30 A. M. and in accordance with the Clearing House practice, paid them by its check, although the payment created an overdraft in the drawer's account (Rec., 20). It did not notify the Clearing House or the Federal Reserve Bank of the insufficiency of the drawer's funds or return the checks to the Federal Reserve Bank by 2:30 P. M. of that day, or, as a matter of fact, at any time thereafter. The next morning the Central Bank presented these four checks to the Ashland Bank and demanded reimbursement. The Ashland Bank got and kept the proceeds of all five checks (Rec., 20-21).

Judgment was entered for the Central Bank against the Ashland Bank in the sum of $14,864.56 (Rec., 24). On appeal to the Circuit Court of Appeals for the Seventh Circuit the judgment was affirmed (Rec., 38). Rehearing was denied (Rec., 40).

Decisions of the District Court and the Circuit Court of Appeals.

The District Court concluded as a matter of law that the payment through the Clearing House and the exchange of credits on the books of the First National Bank did not operate as payment of the checks; that the checks, therefore, were dishonored; that the notice given by the Central Bank to the Ashland Bank on the day after presentment for payment "was in compliance with Section

102 of the Negotiable Instruments Law and fixed the liability of the South Ashland National Bank to reimburse the Central Manufacturing District Bank for the amount of the checks" (Rec., 22). The Circuit Court of Appeals affirmed these holdings and in its opinion said that the Ashland Bank, not being a member of the Clearing House, could take no advantage of their rules, and that accordingly, the failure of the Central Bank to notify the collecting bank within the time prescribed by the rules, or at any time, or to return the checks to the collecting bank, did not result in the payment becoming final; that the checks not being paid, all that was necessary for the Central Bank to do to hold the Ashland Bank was to give the Ashland Bank notice of dishonor within the time provided by Section 102 of the Negotiable Instruments Law, and that "The notice given by the Central Bank to the Ashland Bank was in compliance with the terms of the Negotiable Instruments Law and the Ashland Bank was properly held liable to reimburse the Central Bank for the amount of the checks" (Rec., 38).

The decisions of the District Court and the Circuit Court of Appeals in this case squarely base the right of the Central Bank to recover of the Ashland Bank, the money paid by the Central Bank to the collecting bank and received from the collecting bank by the Ashland Bank, on proper notice of dishonor under the Negotiable Instruments Law. They decide first that the checks were dishonored by nonpayment and that, therefore, notice of dishonor was necessary to fix a liability in the endorser to reimburse the drawee, and that this notice of dishonor was properly given. The decision was not based on any doctrine of the recovery of a payment made through fraud or mutual mistake or to one not receiving the payment in good faith.

It is the contention of petitioner (1) that the payment through the Clearing House resulted in a payment of the

instrument and a discharge of the secondary liability of endorsers thereon, and, (2) that whether the instrument was paid, or dishonored by nonpayment, notice of dishonor has no application to and neither creates nor fixes any rights in a drawee of a check as against a payee or endorser; that an endorser assumes no obligation by his endorsement as to the drawee, and that whatever rights a drawee might have to recover a payment made on a check are independent of and unaffected by the notice of dishonor provisions of the Negotiable Instruments Law.

Statutes Involved.

Section 66 of the Uniform Negotiable Instruments Law (in Illinois found in Chap. 98, Cahill Illinois Revised Statutes 1933, Par. 86) fixing the liability assumed by endorsers by their endorsement, provides, as far as material:

> "And, in addition, every endorser engages that on due presentment, it (the instrument) shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the holder, or to any subsequent endorser who may be compelled to pay it."

Section 88 (Chap. 98, Cahill Illinois Revised Statutes 1933, Par. 110) provides:

> "When a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each endorser, and any drawer or endorser to whom such notice is not given is discharged."

Section 102 (Chap. 98, Cahill Illinois Revised Statutes 1933, Par. 124) provides that the notice of dishonor required by Section 88 "must be given before the close of business hours on the day following" dishonor.

Questions Presented.

(1) Under the general law of negotiable instruments as codified by the Uniform Negotiable Instruments Law does a drawee of a check acquire any rights against an indorser by virtue of giving notice of dishonor?

(2) Where checks are paid through Clearing House Associations, which have rules allowing drawee banks a specified time in which to examine checks drawn on them and to notify collecting member banks if they desire to rescind any payment, and a drawee bank pays the amount of a check presented to it through the Clearing House by a collecting member bank and does not notify the collecting bank within the specified time, or at any time, that it desires to rescind the payment, and the collecting bank remits the same to a depositing indorser who is not a member of the Clearing House, is the payment final and irrevocable as between the drawee bank and the depositing indorser?

Reasons Relied On for Allowance of Writ.

(1) In holding that a drawee of a check, by giving notice of dishonor of the check, secures rights against a prior endorser, the Circuit Court of Appeals has decided an important question of general commercial law in a way probably untenable and in conflict with the weight of authority. The Uniform Negotiable Instruments Law, with minor variations, has been adopted in all of the states of the Union and governs the vast number and amount of payments and transfers of funds by means of negotiable instruments. Uniformity and soundness of decision under this law are of great importance and of far-reaching effect and are not a matter of mere local law. The decision of the Circuit Court of Appeals that a drawee may give notice of dishonor under the Negotiable Instruments Law and thus acquire

rights against an endorser, is contrary to the great weight of authority in this country to the effect that an endorser, by his endorsement, assumes a liability only to subsequent holders, and that a drawee who receives a check for payment is not a holder. It is probably untenable also, as will appear from the supporting brief, in that notice of dishonor under the Negotiable Instruments Law is given only to fix the secondary liability of an endorser to parties prior to the drawee, in the event the drawee does not pay the check upon presentment, and has no application to a case where a drawee is seeking to recover funds already paid. As far as petitioner has been able to determine, it has never before been held that notice of dishonor in any way created any rights in a drawee of a check and we respectfully submit that the question here presented should be considered and determined by this court in the interest of uniformity and soundness of decision under the Uniform Negotiable Instruments Law.

(2) In deciding that payment of a check by a drawee bank, made through a Clearing-House to a collecting bank, may be recovered against a prior endorser who deposited the check in the collecting bank and received the proceeds of the collection, the Circuit Court of Appeals has decided an important question of general law in a way probably untenable and contrary to the weight of authority. The decision is contrary in principle to the decision of this court in *American National Bank* v. *Miller*, 229 U. S. 517, 33 S. Ct. 883, 57 L. Ed. 1310, where this court held that when a drawee bank accepts as a credit to a depositor a check drawn on, and presented to it for payment, the transaction is closed and in the absence of fraud or mutual mistake, is irrevocable. In the present case the drawee, upon presentation of the checks to it for payment through the Clearing House, paid them upon the condition that the payment could be revoked by a certain time. It did

not revoke the payment by that time and the payment then became the same as an unconditional payment. Under the principle of the above case, it would seem this could not be revoked except for fraud or mutual mistake. No fraud or mutual mistake was alleged or relied upon by the Circuit Court of Appeals. The decision is also contrary in principle to the decision of this court in *National Bank* v. *Burkhardt*, 100 U. S. 686 (689), 25 L. Ed. 766; also, to the decision of the Circuit Court of Appeals, for the Second Circuit, in *Riverside Bank* v. *First National Bank of Shenandoah*, 74 Fed. 276, a case holding that a payment of a check by the drawee bank under misapprehension as to the state of the drawer's account, cannot be recovered back from the holder. As will appear from petitioner's brief, the great weight of authority in this country is to the effect that the payment of a check by a drawee, resulting in an overdraft, cannot be recovered from the party to whom paid and *a fortiori* from a prior endorser when the payment was not made to him but to the bank to whom he endorsed it. In view of the fact that most payments of checks in large cities are made through clearing house associations, we respectfully submit the question here involved is of great importance.

Petitioner believes that because of the importance of the questions involved, the importance of uniformity and sound decision under the Uniform Negotiable Instruments Law and the conflict with prior decisions of this court and with the weight of authority in this country on a general question of law, this case should be considered by this court.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, for the Seventh Circuit, demanding said Court to certify and send to this court a full transcript of record

and proceedings of said Circuit Court of Appeals in said cause, Harry E. Hallenbeck, Receiver of South Ashland National Bank, *vs.* W. F. Leimert, Receiver of Central Manufacturing District Bank, No. 5185; that said cause be reviewed and determined by this court, the decision of said Circuit Court of Appeals be reversed by this Honorable Court, and that your petitioners have such other relief as may appear appropriate.

HARRY E. HALLENBECK,
Receiver of South Ashland National Bank,
By WALTER T. FISHER,
His Attorney.

SUPPORTING BRIEF.

Opinions of Courts Below.

District Court: Findings of fact (Rec., 19-22); Conclusions of law (Rec., 19-22); Judgment (Rec., 24).

Circuit Court of Appeals: Opinion (Rec., 35-38), 72 Fed. (2nd) 480.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938 (28 U. S. C. A. Sec. 347)); Petition for rehearing denied September 28, 1934. (Rec., 40.)

STATEMENT OF FACTS.

The facts are stated in the petition, pages 1-3.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in holding that the notice of dishonor given under Section 102 of the Negotiable Instruments Law created or fixed any right in the drawee of the five checks as against the payee or endorser.

(2) The Circuit Court of Appeals erred in holding that the checks were not paid.

BRIEF AND ARGUMENT.

I.

THE DISHONOR PROVISIONS OF THE NEGOTIABLE INSTRUMENTS LAW HAVE NO APPLICATION TO AND NEITHER CREATE NOR FIX ANY RIGHTS IN THE DRAWEE OF A CHECK AS AGAINST THE PAYEE OR ENDORSER.

(a) The presentment of a check to the drawee for payment is not a negotiation and the drawee does not become a holder.

Figuers v. *Fly*, 137 Tenn. 358; 193 S. W. 117.

National Bank of Commerce v. *Seattle National Bank*, 109 Wash. 312; 187 Pac. 342.

First National Bank v. *Brule National Bank*, 41 South Dakota 87; 168 N. W. 1054.

Brannan's Negotiable Instruments Law, 5th Ed. 748.

Louisa National Bank v. *Kentucky National Bank*, 293 Kentucky 302; 39 S. W. (2nd) 497.

"'Holder' refers to one who has taken the instrument as it passes along in the course of negotiation towards the drawee and not the latter." *National Bank of Commerce* v. *Seattle National Bank*, 109 Wash. 312; 187 Pac. 342, at 346.

(b) Section 84 of the Negotiable Instruments Act (Chap. 98, Cahill Illinois Revised Statutes, 1933, Par. 106) provides:

"When the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder."

Section 88 of the same Act (Cahill Illinois Revised Statutes 1933, Par. 110) provides that when a negotiable in-

strument has been dishonored by non-payment "notice of dishonor must be given to the drawer and to each endorser, and any drawer or endorser to whom such notice is not given is discharged."

Section 102 of the same Act (Cahill Illinois Revised Statutes 1933, Par 124) provides the time within which this notice of dishonor must be given.

The Circuit Court of Appeals based and conditioned the right of recovery of the Central Bank, the drawee of the check, on giving due notice of dishonor to the Ashland Bank, the payee-endorser. The above citations make it clear that notice of dishonor is given only to fix the secondary liability of the endorser to a *holder*, who has presented it to the drawee and has been refused payment. These citations further make it clear that there is no secondary liability, except to a *holder* and that the drawee is not a *holder*. Section 89 of the Negotiable Instruments Law (Cahill Illinois Revised Statutes 1933, Par. 111) providing who may give notice of dishonor would seem to be conclusive. It provides "the notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay it to the holder." The drawee not being a holder has no authority under the Negotiable Instruments Law to give notice on his own behalf, nor is he a party who might be compelled to pay it to the holder, because a drawee has no liability to the holder unless and until he certifies the check (Cahill Illinois Revised Statutes 1933, Par. 210). Furthermore, it would seem to be an absurdity to hold that the engagement assumed by an endorser by his endorsement of the instrument that it will be paid on presentment to the drawee is an engagement with the drawee—the very party who is to pay the check.

Consequently, it would seem clearly untenable to hold as

was done by the Circuit Court of Appeals that notice of dishonor could be given by a drawee, so as to create any rights in it as against a prior endorser.

II.

THE PAYMENT MADE THROUGH THE CLEARING HOUSE ASSOCIATION RESULTED IN FINAL AND IRREVOCABLE PAYMENT OF THE CHECKS.

National Exchange Bank v. *Ginn & Co.*, 114 Md. 181; 78 Atl. 1026.

In that case the collecting bank presented a check through the Clearing House to the drawee bank. The check was paid by the drawee bank and was not returned to the collecting bank within the time allowed by the Clearing House rules. The Court held that the check not having been returned within the allowed time, the Clearing House settlement amounted to the same thing as payment over the counter, was final and irrevocable and could not be recovered against the prior endorser who deposited the check in the collecting bank.

In the absence of fraud or mutual mistake, the payment of a check by a bank upon which it is drawn, even under the mistaken belief that the drawer has sufficient funds to his credit to pay the check, cannot be recovered from the payee by the bank paying the check.

American National Bank of Nashville, Tenn. v. *Miller*, 229 U. S. 517; 33 S. Ct. 883; 57 L. Ed. 1310.

Riverside Bank v. *First National Bank of Shenandoah*, 74 Fed. 226; 20 C. C. A. 181.

National Exchange Bank v. *Ginn & Co.*, 114 Md. 181; 78 Atl. 1026.

First National Bank of Denver v. *Devenish*, 15 Colo. 229; 25 Pac. 177.

Bank v. *Burkham*, 32 Mich. 328.

And *a fortiori* payment cannot be recovered, where a payee after endorsing a check generally deposits it to his account in his bank by which it is forwarded to the drawee bank and the latter pays it by mistake, as there is no privity between the paying bank and the payee to support an action to recover money paid by mistake.

National Bank of New Jersey v. *Berrall*, 70 N. J. 757; 58 Atl. 189; 66 L. R. A. 599; 95.
5 Ruling Case Law, Par. 95, Page 571.

In the case at bar the payment sought to be recovered was not made to the Ashland Bank, but to the collecting bank who paid it over to the Ashland Bank. (Rec., 20-21.)

The Central Bank voluntarily paid the checks and voluntarily allowed the time to pass within which, under the rules of the Clearing House Association of which it was a member, it could return the checks if it did not intend the payment to become final. It thus intentionally allowed the payment to become final and is in no different situation than any drawee who has paid a check in cash or given an unconditional credit.

In *Preston* v. *Canadian Bank of Commerce*, 23 Fed. 179, the Circuit Court of Appeals for the Seventh Circuit held that a drawee bank who pays a check to the collecting bank through the Clearing House, and does not rescind the payment within the time allowed by the rules, could not recover the same from the collecting bank. It is difficult to see how the fact that the collecting bank paid the proceeds over to a depositing endorser could change the effect of the payment, or how a check could be paid as to one party and not as to another, no question of fraud or good faith being involved.

III.

THE EXCHANGE OF CREDITS ON THE BOOKS OF THE FIRST NATIONAL BANK AND THE FAILURE OF THE CENTRAL BANK TO REPUDIATE PAYMENT IN THAT METHOD RESULTED IN PAYMENT OF THE CHECK.

American National Bank v. *Miller*, 229 U. S. 517; 33 S. Ct. 883; 57 L. Ed. 1310.

National Bank v. *Burkhardt*, 100 U. S. 686; 25 L. Ed. 766.

The First National Bank on receiving the check endorsed by the Ashland Bank, debited the account of the Central Bank and then sent the check to the Central Bank for payment. The Central Bank accepted the check and never at any time returned it to the First National Bank and thus accepted the debit to its account and sued the Ashland Bank to recover the amount of this debit. It thus accepted this debit as a final debit as far as the First National Bank was concerned, thus ratifying this method of payment to the First National Bank. It is the same in legal effect as though the Central Bank on receiving the checks had given the collecting bank an unconditional credit on its books for the amount of the check. The cases cited above make it clear that this amounts to payment and cannot be revoked, except for fraud or mutual mistake.

Examination of the pleadings make it clear that the declaration filed in this case is not based on the recovery of money paid by mutual mistake or fraud, and both the declaration and the decisions of the District Court and the Circuit Court of Appeals are based on the theory that the checks were not paid. Respondent is bound by his declaration. Furthermore no facts are found by the court which

would justify such a decision even apart from the pleadings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 600.

HARRY E. HALLENBECK, Receiver of SOUTH ASHLAND NATIONAL BANK, *Petitioner*,

vs.

W. F. LEIMERT, Receiver of CENTRAL MANUFACTURING DISTRICT BANK, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER.

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IN THE

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HARRY E. HALLENBECK, Receiver of SOUTH ASHLAND NATIONAL BANK, *Petitioner*,

vs.

W. F. LEIMERT, Receiver of CENTRAL MANUFACTURING DISTRICT BANK, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 72 Fed. (2d) 480, and appears in the printed record, pages 35-38. No written opin-

ion was rendered by the District Court, but its findings of fact, conclusions of law, and order for judgment, appear in the record pages 19-24.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938 (28 U. S. C. A. Sec. 347)); petition for rehearing denied September 28, 1934. (Rec. 40.) Petition for writ of certiorari was filed December 24, 1934, and writ of certiorari was granted January 21, 1935.

III.

STATEMENT OF FACTS.

The respondent, W. F. Leimert, Receiver of Central Manufacturing District Bank, of Chicago, Ill., (hereinafter referred to as the "Central Bank") filed suit in the District Court for the Northern District of Illinois, to recover from petitioner Harry E. Hallenbeck, Receiver of the South Ashland National Bank, of Chicago, Ill., (hereinafter referred to as the "Ashland Bank") the amount paid on five checks of face amounts aggregating $13,733.92 (Rec. 2-11). The case was tried before the District Judge, sitting without a jury and Special Findings of Fact and Conclusions of Law were made and filed of record by the court (Rec. 19-22).

On March 26th, 1932, James G. Hodgkinson, who was vice-president of Hodgkinson & Durfee, Inc., and also of petitioner, the Ashland Bank, drew four checks of the corporation, Hodgkinson & Durfee, Inc., aggregating $12,183.92, on the Central Bank (Rec. 19), payable to the order of the Ashland Bank, and delivered the same to the Ashland Bank, the same being thereafter carried by the Ashland bank on its books as assets (Rec. 20). On April 23rd, 1932, Hodgkin-

son drew another check of the corporation, Hodgkinson & Durfee, Inc., upon the Central Bank for $1,550., payable to the order of Hodgkinson and by him indorsed, and delivered to the Ashland Bank. On Saturday, April 23rd, 1932, four of these checks were indorsed and deposited by the Ashland Bank in the Federal Reserve Bank of Chicago for collection, (Rec. 20), and the fifth check, in the amount of $2,600. was indorsed by the Ashland Bank and forwarded to the First National Bank of Chicago for collection (Rec. 20).

Both the Central Bank and the Ashland Bank maintained accounts in the first National Bank (Rec. 21). On the next business day, Monday, April 25th, the First National Bank credited the Ashland Bank and debited the Central Bank for the amount of the check sent to it for collection. On that day, the drawer of the check, Hodgkinson & Durfee, Inc., had a balance in the Central Bank of $9.85. The check was then sent by messenger to the Central Bank and arrived there some time after noon of the same day. The Central Bank received the check and although its payment would create an overdraft in the drawer's account, did not return it to the First National Bank that day or in fact any time thereafter, and never made a claim against the First National Bank for a cancellation of the debit to its account (Rec. 21).

On the same day, Monday, the four checks indorsed and deposited with the Federal Reserve Bank for collection were presented by it to the Central Bank for payment, through the Chicago Clearing House Association (Rec. 20). The Federal Reserve Bank was a member, and the Central Bank an affiliated member, of the Clearing House. The Ashland Bank was neither a member nor an affiliated member (Rec. 20). A rule of the Clearing House in force at that time provided that in order that member banks presenting checks for payment through the Clearing House might have an opportunity to give special instructions as

to the protest of unpaid items, notice of non-payment of any such items drawn on affiliated member banks must be given by telephone before 2:30 p.m. of the same day *to the member bank presenting such items through the Clearing House.* (Rec. 21).

In accordance with the rules of the Clearing House, the Central Bank, by its check, paid the amount of these checks at the Clearing House (Rec. 20). These checks were then delivered by messenger of the Clearing House before 11:30 o'clock A. M. of the same day, to the Central Bank (Rec. 20). The Central Bank did not notify the Clearing House or the Federal Reserve Bank of the insufficiency of the drawer's funds or return the checks to the Clearing House or the Federal Reserve Bank by 2:30 P. M. of that day, or, as a matter of fact, at any time thereafter (Rec. 21). It was some time after noon, and several hours after its Clearing House balance had been settled before anyone in the Central bank learned that the payment of these four checks would create an overdraft in the account of drawer, Hodgkinson & Durfee, Inc. (Rec. 20).

When the Central Bank learned of the overdraft "that had been caused in the account of Hodgkinson & Durfee if these five checks were paid" it notified Hodgkinson. On the next morning, Tuesday, the Central Bank presented all five checks to the Ashland Bank and demanded reimbursement, which was refused. The Ashland Bank received the proceeds of all five checks (Rec. 21).

On the Findings of Fact substantially represented by the foregoing, the District Court concluded as a matter of law, inter alia:

1. That the five checks were not paid by the Central Bank;

2. That the notice given by the Central Bank to the Ashland Bank the day ~~after~~ presentment for payment "was in compliance with Section 102 of the Negotiable Instruments Law and fixed the liability of the South Ashland National

Bank to reimburse the Central Manufacturing District Bank for the amount of the checks" (Rec. 22).

Judgment was entered for the Central Bank against the Ashland Bank for $14,864.56 (Rec. 24).

On appeal to the Circuit Court of Appeals for the Seventh Circuit, judgment was affirmed (Rec. 35-38).

Rehearing was denied (Rec. 40).

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in concluding as a matter of law on the special findings of fact that the checks were not paid.

2. The Circuit Court of Appeals erred in concluding that the notice given by the Central Bank ~~to the Ashland Bank~~ on Monday, April 25, 1932, was in compliance with Section 102 of Negotiable Instruments Law, and fixed the liability of the Ashland Bank to reimburse the Central Bank for the amount of the checks.

3. The Circuit Court of Appeals erred in concluding that judgment should be entered in favor of the Central Bank against the Ashland Bank in the sum of $14,864.56, and costs, or in any sum whatsoever.

4. Having found as a matter of law that the checks were not paid, the Circuit Court of Appeals erred in holding that the Ashland Bank was liable to reimburse the Central Bank for the amount of the checks.

V.

ARGUMENT.

Summary of Argument.

Point A. The Dishonor Provisions of the Negotiable Instruments Law Have No Application To and Can Neither Create Nor Fix Any Rights in the Drawee of a Check as Against an Indorser.

Point B. The Checks Presented for Payment Through the Clearing House by the Federal Reserve Bank of Chicago Were Paid by the Central Bank, the Drawee of the Checks.

Point C. The Payment of a Check by a Bank Upon Which it is Drawn, Even Under the Mistaken Belief that the Drawer has Sufficient Funds to His Credit to Pay the Check, Cannot be Recovered from the Payee by the Bank Paying the Check.

Point D. The Exchange of Credits on the Books of the First National Bank and the Failure of the Central Bank to Repudiate Payment by that Method Resulted in Payment of the Check.

Point E. The Circuit Court of Appeals Having Found that the Five Checks Were Not Paid by the Central Bank, it Necessarily Follows that the Ashland Bank Cannot be Charged with Receiving Funds Belonging to the Central Bank and the Case Should Have Been Dismissed.

POINT "A."

The dishonor provisions of the negotiable instruments law have no application to and can neither create nor fix any rights in the drawee of a check as against the payee or indorser.

Section 102 of the Negotiable Instruments Law (Par. 124 of Article VIII (entitled: "Notice of Dishonor") Ch. 98, Cahill's Illinois Revised Stat. 1933), the section of the statute relied on by both the District Court and the Circuit Court of Appeals as fixing the liability of the Ashland Bank to reimburse the Central Bank, reads as follows:

> "Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:
>
> 1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following."

It will be observed that the Central Bank was the drawee of all five checks and that they were presented to it for payment. (Rec. 19-20.) The District Court having concluded that what was done by the Central Bank after presentation to it of the checks for payment, did not result in payment, concluded that it could recover from the Ashland Bank, an indorser, upon giving notice of dishonor within the time provided by the above section of the Negotiable Instruments Law. A brief examination of the fundamental principles of negotiable instrument law, as well as the specific provisions of the Uniform Negotiable Instruments Law, will at once demonstrate that this conclusion could result only from a fundamental misconception of the theory and purpose of notice of dishonor in connection with negotiable instruments.

Notice of dishonor is merely a step in the procedure whereby the *holder* of a check (or other negotiable instru-

ment) enforces the secondary liability assumed by an indorser by his indorsement to reimburse the holder *where the drawee has refused to honor and pay the instrument.* This secondary liability of an indorser is defined by Section 66 of the Negotiable Instruments Law (Par. 86, Ch. 98, Cahill's Illinois Revised Sta. 1933) as follows:

> "Every indorser engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken he will pay the amount thereof to the *holder or to any subsequent indorser* who may be compelled to pay it." (Italics inserted.)

Section 84 of the Negotiable Instruments Law (Par. 106, Ch. 98, Cahill's Illinois Revised Sta. 1933) provides:

> "Subject to the provisions of this Act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder."

Section 88 of the Negotiable Instruments Law (Par. 110, Ch. 98, Cahill's Illinois Revised Sta. 1933) provides:

> "Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

Said Section 88, and also Section 102, which was the one relied on by both courts in this case, fix the procedure and time within which this notice of dishonor by non-payment of the instrument must be given to prevent the discharge of the secondary liability of indorsers fixed by Section 66. Consequently, unless this secondary liability of indorsers runs in favor of the *drawee,* notice of dishonor can have nothing to do with any right a drawee might have to recover

payment made on a check. By the specific terms of the statute this secondary liability of indorsers runs only to "holders", and under section 88 notice is to be given to the "drawer and to each endorser", no provision being made for notice to the *drawee. The law is well settled that the presentment of a check to the drawee for payment is not a negotiation and the drawee does not become a holder.*

Figuers v. Fly, 137 Tenn. 358; 193 S. W. 117;
National Bank of Commerce v. Seattle National Bank, 109 Wash. 312; 187 Pac. 342, 345, 346;
First National Bank v. Brule National Bank, 41 South Dakota 87; 168 N. W. 1054, 1055;
Brannan's Negotiable Instruments Law, 5th Ed. 748;
Louisa National Bank v. Kentucky National Bank, 239 Kentucky 302; 39 S. W. (2nd) 497, 500, 501;
American Hominy Co. v. Milliken National Bank, 273 Fed. 550, 555, 556.

"'Holder' refers to one who has taken the instrument as it passes along in the course of negotiation towards the drawee and not the latter." *National Bank of Commerce v. Seattle National Bank,* 109 Wash. 312, at 322; 187 Pac. 342, at 346.

Also see:

National Bank of Rolla vs. First Natl. Bank of Salem (Mo.), 125 S. W. 513, 514, 141 Mo. Apps. 719;
First Natl. Bank vs. United States Natl. Bank, 197 Pac. 547, 551, 552, 553, 555; 100 Or. 264;
First Natl. Bank vs. Bank of Cottage Grove, 117 Pac. 293, 295, 296; 59 Or. 388;
South Boston Trust Co. vs. Leven, 143 N. E. 816, 817; 249 Mass. 45;
Wells Fargo Bank & Union Tr. Co. vs. Bank of Italy, et al., 4 Pac. (2) 781, 784, 785, 214 Cal. 156.

A check is an order by the drawer-depositor on the drawee bank to pay the amount thereof to the holder. The

drawee bank is not liable to the *holder* "unless and until it accepts or certifies the check." Section 188 of the Negotiable Instruments Law (Par. 210, Ch. 98, Cahill's Illinois Revised Sta. 1933). (Appendix, pg. 26.)

If the drawee decides to pay the check upon presentment for payment, the check is extinguished. If the drawee decides not to pay it, indorsers are liable under Section 66 to the holder who presented it to the drawee for payment and was refused payment provided the holder gives the necessary notice of dishonor required by the sections of the statute above quoted.

Apart from any consideration of whether the drawee might become a holder under *any* circumstances, it would seem to be a manifest absurdity to say that the obligation assumed by an indorser to reimburse subsequent holders if the *drawee refuses to pay* the check upon presentment, is an engagement by the indorser with the drawee himself, who is the very party on whom the check is an order to pay; and yet this is a necessary result of the decision in this case.

Petitioner respectfully submits that whatever rights a drawee may have to recover a payment made on a check, *are independent of and unaffected by the dishonor provisions of the Negotiable Instruments Law.* If a payment is conditional, or made under a mistake of fact, or through fraud, it might have a right of recovery from the payee under general principles of law, but obviously this right could not in any way be fixed or created by notice of dishonor under Sections 102 and 88 of the Negotiable Instruments Law. *On this ground, alone, petitioner submits the decision in this case should be reversed.*

POINT "B."

The checks presented for payment through the Clearing House by the Federal Reserve Bank of Chicago were paid by the Central Bank, the drawee of the checks.

On the basis of the special findings of fact the District Court concluded as a matter of law that the checks presented for payment through the clearing house by the Federal Reserve Bank were not paid by the Central Bank, the drawee. (Rec. 22.) Petitioner challenges this conclusion of law on the undisputed facts.

If the checks were paid, obviously the Central Bank would have to show fraud, or some mutual mistake of fact, in order to afford it a basis of recovery under general principles of law. It is not contended that the declaration pleaded any such case or that there was any attempt to show a right of recovery on any such ground.

We shall consider first the four checks that were presented for payment through the clearing house. The check that was collected through the First National Bank will be taken up later.

The principal purpose of clearing house associations is the facilitation of payment of checks drawn on various banks in large centers by dispensing with the handling and counting of cash in every instance. In general, clearing house payments take the following form: Each of the member banks sends to the clearing house on each day the checks held by it drawn on other member banks made up in packages, each package containing only the checks drawn on a single bank and marked with the total amount thereof. The sums so indicated are accepted in the clearing house settlement and each bank whose indebtedness for checks drawn on it exceeds its credits pays the balance. The checks are then sent to the banks on which drawn and they have until a stated time to verify the amount, the genuineness of the checks, or whether drawn against insufficient funds, etc., and

if found incorrect or payment refused for any reason, to notify the presenting bank, in which event the presenting bank must refund the drawee bank the amount of any such checks.

Record 20-21;
3 Ruling Case Law, 651-652;
12 American Law Reports, Annotated, 998;
Preston v. Canadian Bank of Commerce, (C. C. A. 7) 23 Fed. 179, 181, 182;
Watson's Clearing House Law, 1902, 4-5.

The law is well settled that the payment or settlement of the clearing house balance, which is required before the various drawee banks have an opportunity to examine the individual items, is only a provisional or conditional payment and any check may be returned to the collecting bank *within the time limit fixed by the clearing house rules.* Until that time limit expires payment has not been accomplished and neither a member bank nor a non-member bank can claim that the settlement of the clearing house balance constituted a final payment.

Columbia-Knickerbocker Trust Co. v. Miller, 215 N. Y. 191; 109 N. E. 179, 180;
Schneider v. Bank of Italy, 184 Cal. 595; 194 P. 1021, 1022;
German National Bank v. Farmers' Deposit Bank, 118 Pa. 294; 12 Atl. 303, 305, 306;
Merchants' National Bank v. National Eagle Bank, 101 Mass. 281;
Preston v. Canadian Bank of Commerce (C. C. A. 7) 23 Fed. 179, 181, 182.

However, if the drawee bank retains any check *and does not notify the presenting bank before the expiration of the time limit* fixed by the clearing house rules that it desires to revoke the provisional payment, it becomes final and constitutes payment in the same manner as if cash were paid over the counter, and any right of recovery depends upon

the general principles of law governing the recovery of voluntary payments.

3 Ruling Case Law, 653;
German National Bank v. Farmers' Deposit Bank, 118 Pa. 294; 12 Atl. 303, 305, 306;
National Bank of North America v. Bangs, 106 Mass. 441, 443, 444, 445;
Boylston National Bank v. Henry L. Richardson, et al., 101 Mass. 287, 290, 291;
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In Re Smith, Lockhart & Co., 3 F. (2) 444, 447;
Geibe v. Chicago-Lake State Bank, 199 N. W. 514, 516; 160 Minn. 89;
Pierson vs. Interborough Rapid Transit Co., 168 N. Y. Supp. 422, 425;
Eastman Kodak Co. vs. Natl. Park Bank, 231 Fed. 320, 324;
Campbell vs. Love, 150 So. Rep. 780, 782;
Atlas Nat. Bank vs. Natl. Exchange Bank, 57 N. E. 605, 609, 176 Mass. 300;
South Carolina Natl. Bank vs. McCandless, 44 F. (2) 111, 113, 114;
Hentz vs. Natl. City Bank, 144 N. Y. Supp. 979, 981.

In the case of *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281, a case where a check was not returned within the time limit fixed by the rules of the clearing house, the court said at page 286:

> "And if by any mistake of fact return of the check is not so made, then, as between the two banks it is to be treated as a payment made under a mistake of fact, precisely to the same extent, and with the same right to reclaim, which would have existed if the payment had been made by the simple act of passing money across the counter directly to the payee on the presentation of the check."

In the case of *National Exchange Bank v. Ginn & Co.*, 114 Md. 181; 78 Atl. 1026, 1027, the drawee bank failed to return the check within the allowed time. Suit was brought by the drawee against the payee, who was not a member of the clearing house but who had deposited the check in a collecting bank, a member of the clearing house. The court said, at page 184:

> "So far as the purposes of this case are concerned, the situation is precisely the same as if the appellees had in person presented the check to the appellant and had received the money over its counter."

In the various cases that have arisen where the drawee has failed to return the check within the time limited by the clearing house rules recovery has been sustained or denied depending upon the existence of facts which would authorize or deny recovery of a voluntary payment under general principles of law.

In *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281, recovery was allowed against the collecting bank because of a mutual mistake of fact.

In the next case in the same volume of the Massachusetts Reports, *Boylston National Bank v. Henry L. Richardson, et al*, 101 Mass. 287, where the action was against a depositor in the collecting bank, recovery was denied, the mistake in that case being as to the condition of the drawer's account.

In *National Exchange Bank v. Ginn & Co.*, 114 Md. 181; 78 Atl. 1026, the action was also against a depositor in the collecting bank. Recovery was denied, the mistake claimed in that case being lack of knowledge that a receiver had been appointed for the drawee.

It will be found upon examination of all of these cases that the settlement of the clearing house balance and a failure to return within the time limit, was treated as though it were a payment of cash over the counter; and recovery

was denied or allowed depending upon the general principles of law governing the recovery of voluntary payments.

The Circuit Court of Appeals for the Seventh Circuit, in the case of *Preston v. Canadian Bank of Commerce,* 23 Fed. 179, went even further and held that where the action *was between the drawee and the collecting bank* the payment could not be recovered, even where there was a mistake, because the clearing house rules amounted to a contract limiting the time within which a mistake could be corrected. However, whether the clearing house rules are interpreted as a contract which does not allow mistakes to be remedied after a certain time, or merely as fixing the time of the payment, *it is clear that a failure to return within the prescribed time results in payment.*

In the present case, recovery was allowed, not because of any mistake or fraud in making the payment, but on the ground that the checks were not paid.

It seems to be conceded by respondent and by the Circuit Court of Appeals (see opinion Rec. 38) that if the Central Bank had sued the collecting bank the payment would have been considered final. The court said, however, that the Ashland Bank, not being a member of the clearing house, could take no advantage of the clearing house rules, and denied that the provisional payment resulting from a settlement of the clearing house balance became final when the Central Bank failed to return the check to the Federal Reserve Bank by 2:30 o'clock, the time allowed under the Chicago Clearing House rules. (Rec. 38) It then said (Rec. 37) that the payment would not become final until the time for giving notice of dishonor under the Negotiable Instruments Law had expired. As shown in Point A of this brief, the time for giving notice of dishonor under the Negotiable Instruments Law has nothing whatsoever to do with the right of a *drawee* to recover a payment made on a check, or with the liability of an indorser on a check to the drawee.

The Ashland Bank indorsed the four checks in question

and deposited them for collection with the Federal Reserve Bank. The Federal Reserve Bank was a member of the clearing house. It presented the checks for payment through the clearing house to the Central Bank, also a member of the clearing house. (Rec. 20-21) *The payment was between two members of the clearing house and made in accordance with its rules. The nature and effect of that payment can only be determined from what those two banks did. The Ashland bank presented the checks for payment through its agent, the Federal Reserve Bank, and is entitled to rely upon the legal effect of the transaction between said agent and the drawee bank. Geibe vs. Chicago-Lake State Bank,* 199 N. W. 514, 516. *In Re Smith, Lockhart & Co.* 3 F. (2) 444, 447. Also see: *Moore vs. Amer. Sav. Bank & Trust Co.,* 189 Pac. 1010, 1012.

As is said in the case of *Columbia-Knickerbocker Trust Co. v. Miller,* 142 N. Y. Supp. 440, at 442:

> "All of these acts were performed by banks which were members of the clearing house association and were bound by its rules, and these rules must be considered in determining the intent of these banks, regardless of any question of whether these rules are binding upon a mere depositor in the plaintiff bank."

In that case, the check was returned within the allowed time. An outsider claimed that the settlement of the clearing house balance resulted in payment, even though the check was returned within the allowed time, arguing that the check was returned for a reason not allowed by the clearing house rules. The court held that there was no payment, inasmuch as before the payment became final the check was returned, and it was of no concern to the defendant, a nonmember of the clearing house, whether the clearing house rules were violated.

So, in the case at bar, *if* the check had been returned before 2:30 o'clock, the provisional payment would not have

become final and in such event, petitioner's rights depending upon payment, it could not claim or take advantage of any contract embodied in the clearing house rules which might have protected the collecting bank, a member of the clearing house. The Central Bank, knowing the provisional payment would become final at 2:30 o'clock, unless it notified the collecting bank, deliberately allowed that time to pass without seeking to revoke the payment, and it cannot *now* base any rights on non-payment.

An examination of the cases hereinabove cited under this point will disclose that the expiration of the time allowed under the clearing house rules, without return of the check by the drawee bank, is treated or classified as payment, regardless of whether the suit was against the forwarding, *i. e.*, presenting, member bank, or against a non-member depositor in the forwarding, *i. e.*, presenting, bank.

It is clear from the above review of the authorities in this country that the settlement of the clearing house balance by the Central Bank and a failure to return the check or revoke the payment before 2:30 o'clock of the same day resulted in a payment of the four checks.

Furthermore it may be observed that the fact that the Central Bank filed suit to recover the alleged proceeds of said checks from the Ashland Bank, necessarily commits it to the position that it made payment of said checks to the Federal Reserve Bank through the Clearing House transaction, as to four of the checks, and to the First National Bank as to the fifth check, and that the Ashland Bank received these payments from the Federal Reserve Bank and from the First National Bank, respectively. Hence it follows, from this position of the Central Bank, that payment of the checks must be taken as an accepted or conceded fact.

To sustain recovery it is necessary for respondent to show such mistake or fraud as would under the circumstances justify recovery of a voluntary payment under general principles of law. The clearing house rules do not help

or hinder the Central Bank if recovery of a voluntary payment by a drawee may be had under general principles of law.

This court has held that the voluntary payment of a check by the drawee cannot be recovered unless there is *mutual* mistake or fraud.

> *American National Bank v. Miller*, 229 U. S. 517; 33 S. Ct. 883; 57 L. Ed. 1310.
> *National Bank v. Burkhardt*, 100 U. S. 686; 25 L. Ed. 766.

Inasmuch as the checks were paid, the decision in the case at bar is contrary to the above decisions. We will show in the next Point that there was no such mistake or fraud as would justify a recovery under general principles of law.

POINT "C."

The payment of a check by a bank upon which it is drawn, even under the mistaken belief that the drawer has sufficient funds to his credit to pay the check, cannot be recovered from the payee by the bank paying the check.

The great weight of authority in the United States is to the effect that a drawee bank which voluntarily pays a check drawn upon it, cannot recover the payment from the payee, even though the payment is made under the mistaken belief that the drawer has sufficient funds to his credit to pay the check.

Riverside v. First National Bank of Shenandoah, 74 Fed. 276, 278;
1st Nat. Bank v. Burkham, 32 Mich. 328, 330;
First National Bank of Denver v. Devenish, 15 Colo. 229; 25 Pac. 177, 178;
National Bank v. Burkhardt, 100 U. S. 686, 689; 25 L. Ed. 766;
National Bank of New Jersey v. Berrall, 70 N. J. 757; 58 Atl. 189, 190;
5 Ruling Case Law, 569-572;
American National Bank v. Miller, 229 U. S. 517, 521; 33 S. Ct. 883; 57 L. Ed. 1310;
Huffman vs. Farmers' Natl. Bank, 10 S.W. (2) 753, 755;
Hayes vs. Tootle-Lacy Natl. Bank, 72 F. (2) 429, 432;
Security Natl. Bank vs. Old Natl. Bank, 241 Fed. Rep. 1, 9, 14;
Liberty Trust Co. vs. Haggerty, 113 Atl. 596, 597; 92 N. J. 609;
Citizens Bank vs. Schwarzschild & Sulzberger Co., 64 S. E. Rep. 954, 956; 109 Va. 539;
Oddie vs. Natl. City Bank, 45 N. Y. 735, 741.

Some courts base this rule on the ground that there is no privity between the holder of a check and the drawee; others upon the ground that since the bank always has

the means of knowing the state of the depositor's account by simply looking at its books, such a payment is not a payment by mistake within the meaning of the legal rule which ordinarily permits a recovery.

Assuming for discussion that the *Central Bank* in the present case made a mistake as to the state of the drawer's account, and that the pleadings and special findings were framed under that theory, *still under the rule announced by the above cases there would be no right of recovery.* However, there was no finding by the District Court that there was any mistake of fact. The only finding is:

> "It was some time after noon, several hours after its 'Clearing House Balance' had been settled, before anyone in the Central Manufacturing District Bank learned that the payment of these four checks would create an overdraft in the account of Hodgkinson & Durfee, Inc., because on that day Hodgkinson & Durfee, Inc., had a balance in the Central Manufacturing District Bank of Nine and 85/100ths Dollars $9.85." (Rec. 20-21.)

It does not appear whether this knowledge came to the Central Bank before or after 2:30 o'clock, or that any mistake prevented the Central Bank from ascertaining the state of the drawer's account before 2:30 o'clock. Nor is there any finding that the Ashland Bank did not receive the payment in good faith, the court's decision allowing recovery without discussion of mistake or good faith. It did appear that Hodgkinson was vice-president of the drawer of the check and also of the Ashland Bank. There is no finding that Hodgkinson's knowledge, if he had knowledge of facts prejudicial to the Central bank and/or to the Ashland bank (and there is no finding that he had such knowledge), was imputed to the Ashland bank, and the law is well settled that there is a presumption that an officer of the bank will not disclose those matters of which he has knowledge which it may be to his interest to conceal.

American National Bank of Nashville, Tennessee v. Miller, 229 U. S. 517-521; 33 S. Ct. 883; 57 L. Ed. 1310.

As far as appears from the findings, the Central Bank voluntarily paid the checks and took its chance on getting payment back from the drawer.

The declaration of the respondent does not allege the payment of money under a mistake of fact or to one not receiving it in good faith and does not claim recovery on any such grounds. (Rec. 3-10.) *Nor did the court make any findings which would enable the respondent to recover on that theory.*

It is a familiar principle of law that every fact necessary to constitute a cause of action must be pleaded and proved in order to entitle plaintiff to recover. *Regina Feder v. The Midland Casualty Company,* 316 Ill. 552; 147 N. E. 468, 471. If respondent had sued on the theory of recovering a payment made by mistake or to one not receiving the payment in good faith, it would have had to allege facts in the declaration justifying a recovery on that theory, and petitioner would have had an opportunity to present evidence along that line. *The case was not tried on that theory and no facts were found by the court which would justify a recovery on that theory. Respondent is bound by its declaration and the theory upon which the case was tried.*

The cases cited under Point "B" show that the payment through the clearing house under the circumstances was the same as a payment over the counter. The cases cited in this Point show that such a payment cannot be recovered, under the circumstances at bar, even if a proper case were made by the declaration.

POINT "D."

The exchange of credits on the books of the First National Bank and the failure of the Central Bank to repudiate payment by that method resulted in payment of the check.

This court has held that the giving of an unconditional credit by the drawee bank on presentation of a check for payment results in payment in the same manner as a payment of cash over the counter.

> *National Bank v. Burkhardt,* 100 U. S. 686, 689; 25 L. Ed. 766;
> *American National Bank v. Miller,* 229 U. S. 517, 520, 521; 33 S. Ct. 883; 57 L. Ed. 1310.

The Central Bank maintained an account with the First National Bank. On the receipt of the check indorsed by the Ashland Bank, the First National Bank immediately debited the account of the Central Bank for the amount of the check and credited the Ashland Bank. The check was then sent by messenger to the Central Bank and presented for payment (Rec. 20-21). The Central Bank received the check and although its payment would create an overdraft, it never, at any time, returned the check to the First National Bank or demanded a cancellation of this debit, but sued the Ashland Bank for the amount represented by this debit, thus, ratifying this method of payment to the First National Bank. In legal effect, it is the same as though on presentation for payment the Central Bank had given the First National Bank an unconditional credit on its own books for the amount of the check. The authorities above cited show that this amounts to payment. We have shown under Point "B" of our argument that a payment by the drawee of a check cannot be recovered, even when made under the mistaken belief that the drawer had sufficient funds or would make the check good.

It may be observed that if the debit by the First National Bank to the account of the Central Bank was not accepted by the Central Bank, then the First National Bank was bound to pay the full amount to the Central Bank on demand. The fact that it might refuse to do so and the Central Bank might have to sue the First National Bank to secure its full credit, could not alter the situation. In such a case, the Central Bank would have no claim against the Ashland Bank as it had received nothing that belonged to the Central Bank. The Central Bank, however, saw fit to accept the debit entered by the First National Bank to its account, without seeking to cancel or repudiate the same to the First National Bank, thus, voluntarily making payment by that method. Whether it thought it could get this money from the drawer, or that the Ashland Bank would voluntarily reimburse it if the drawer did not, is immaterial. Having volunarily made payment, its right to recover must rest on the general principles of law governing recovery of payments, and such a case would have to be made out by the pleadings. We refer the court to our argument under Points "B" and "C" on this question.

POINT "E."

The Circuit Court of Appeals having found that the five checks were not paid by the Central Bank, it necessarily follows that the Ashland Bank cannot be charged with receiving funds belonging to the Central Bank and the case should thereupon have been dismissed.

The Trial Court, and the Court of Appeals, both held that the Clearing House transactions in the case of four checks, and the transaction with the First National Bank, in the case of one check did not constitute payment. Upon this premise, it necessarily follows that if payment was *not* made by the Central Bank to the Federal Reserve Bank and/or to the First National Bank, *no money of the Central Bank passed from the Federal Reserve Bank or from the First National Bank to the Ashland Bank* and that the remittances, if any, by the Federal Reserve Bank and by the First National Bank to the Ashland Bank, are transactions entirely between those banks and the Ashland Bank, with which the Central Bank is not concerned. The remedy of the Central Bank, if any, would be against the Federal Reserve Bank and the First National Bank, respectively, to recover its balances undiminished by the amounts of the checks in question. Consequently it was clearly error, under these circumstances, for the Court of Appeals to hold that the Ashland Bank was liable to reimburse the Central Bank for the amount of said checks.

CONCLUSION.

It is therefore respectfully submitted that this court should reverse the decision of the Circuit Court of Appeals for the Seventh Circuit.

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APPENDIX.

Paragraph 210 Chapter 98 Cahill's Illinois Revised Statutes 1933 (Sec. 188 N. I. L.):

> "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 600

HARRY E. HALLENBECK, Receiver of SOUTH ASHLAND NATIONAL BANK,

Petitioner,

vs.

W. F. LEIMERT, Receiver of CENTRAL MANUFACTURING DISTRICT BANK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DANIEL M. HEALY,
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OPPOSING BRIEF AND ARGUMENT.

I.

By proper endorsements all the checks were made payable to bearer. When the Central Bank got the checks it became the holder. It derived title to the checks through holders in due course. Thereby the Central Bank acquired all the rights of such prior holders.

Section 9, Subsection 5 of Negotiable Instrument Act, also Sections 58 and 190.

(Cahill Illinois Revised Statutes, 1933, Chap. 98.)

Section 9, Subsection 5, provides that an instrument is payable to bearer "when although originally payable to order, it is endorsed in blank by the payee or a subsequent endorsee."

Four of the checks were endorsed by the Ashland Bank, which, in turn, endorsed them payable to the order of any bank or banker. The other check was endorsed by the Ashland Bank payable to First National Bank, which endorsed it in blank.

Section 58 provides that:

> "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder."

Section 190 defines a *Holder* as:

> "The payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof."

The Federal Reserve Bank and the First National Bank were holders in due course. They endorsed the checks in blank thereby making them payable to bearer. Central Bank became the holder and derived title through holders in due course, and consequently succeeded to all their rights.

II.

Neither the settlement by the Central Bank of its Clearing House balance nor the exchange of credits on the books of the First National Bank constituted payment by the Central Bank of any of the checks in question.

Brady on Bank Checks (2nd Ed.) 502.
Schneider v. *Bank of Italy*, 194 Pac. 1021 (Cal.).
Columbia-K. Trust Co. v. *Miller*, 215 N. Y. 191.
Hentz v. *National City Bank*, 144 N. Y. 979.
5 Michie on Banks & Banking, 575.

The fact that the Central Bank gave its check in settlement of the Clearing House balance, and that four of the checks in question, were among those which went to make up this balance, does not constitute payment. After making such settlement, the Central Bank had the right to a reasonable opportunity to examine the checks and the accounts on which they were drawn, and dishonor the checks that were not supported by the account on which they were drawn.

The Circuit Court of Appeals properly held this to be so and that the check given by the Central Bank in settlement of the Clearing House balance did not constitute final payment.

In

Columbia-Knickerbocker Trust Company, 215 N. Y. 191,

in discussing the question of whether or not the settlement of a clearing house balance constituted payment of any particular check, the court said:

> "Doubtless, the adjustment of balances by the Clearing House constitutes a sort of tentative or provisional payment, but that adjustment occurs without an oppor-

tunity to the members to examine the items, verify signatures, compare the amounts with the drawers' accounts, and the like, and regardless of whether the checks are good. The constitution of the association contemplates that the members will directly adjust between themselves claims arising from the return of checks. It thus appears that the question of payment is not, and cannot be, ultimately decided until the bank upon which the check is drawn has had an opportunity at its banking house to examine the checks."

In the same decision the Court also said:

"Concededly, the adjustment of the accounts at the Clearing House is, at most, tentative and provisional, and subject to an examination by each member of the checks drawn upon it."

The other authorities cited above are to the same effect. Counsel, practically, concede this but claim that the Central Bank, having elected to dishonor the checks, should have notified the Clearing House by 2:30 o'clock in the afternoon on the same day in accordance with its rules; that it did not give such notice, and, therefore, that the payment became unconditional and irrevocable after 2:30 o'clock in the afternoon.

The answer is given by the Circuit Court of Appeals and by the authorities cited under the next heading to-wit: The Ashland Bank was not a member of the Clearing House and, therefore, was not affected by them.

III.

The rules of the Clearing House are binding upon and for the benefit of its members alone and non-members cannot claim the benefit thereof.

1 Morse on Banks and Banking, (6th Ed.) 810.

National Ex. Bank v. *Ginn & Co.*, 114 Md. 181.

Merchants Nat'l Bank v. *National Bank of the Commonwealth*, 139 Mass. 518.

Brady on Bank Checks, (2nd Ed.) 503.

8 Michie on Bank & Banking, 165.

In

1 Morse on Banks and Banking, (6th Ed.), page 810,

it is said:

"The By-laws, rules and usages are binding upon members of the association. No outside bank is under any degree of obligation to observe them. But, on the other hand, no outside bank can have any remedy against any member of the association for a breach of them. They are in the nature of a contract to which the outsider is no party. The duty of adhering to them runs from each of the members to each and all the rest, but to no other person or corporation; at least unless any special and peculiar course of dealing between any member and any outside individual has operated to place that member under an express and exceptional obligation to the outsider to adhere in all matters in which he is interested to the regulations of the clearing house. Generally, 'those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption and bound by them *inter sese* only.''

In

National Exchange Bank of Baltimore v. *Ginn & Company*, 114 Md. 181,

a very similar situation to the one in the present case

was presented. There, also, there was a failure on the part of the drawee bank to return a certain check within the time limited by the clearing house rules. The drawee bank in the case was a member of the Baltimore Clearing House. The payee of the check, however, was not a member and therefore stood in the same position as the Ashland Bank in this case. In discussing the effect of the drawee bank's failure to comply with the clearing house rules, the court said (p. 1027):

> "As the suit is directly against the payee of the check, the situation is not affected by the rules of the clearing house through which it was presented and collected. One of these rules provides 'that errors in exchange and claims arising from the return by eleven o'clock a. m. directly between the banks which are parties hereto, and not through the clearing house,' and that 'upon request made before eleven o'clock a. m. every bank shall extend until twelve o'clock the time for returning to it checks 'not good.' When the offer was made at about a quarter to twelve o'clock to return the check under consideration, it was refused upon the ground that it was made after 11 o'clock, and that there had been no request prior to that hour for an extension of time. It is well settled that such a regulation is binding only upon the members of the Clearing House Association. Its rules are designed exclusively for their convenience and protection as among themselves, and have no effect upon the rights or liabilities of other parties. 5 Cyc. 614; *Merchants' Nat. Bank* v. *Nat. Bank of Commonwealth*, 139 Mass. 518, 2 N. E. 89; *Overman* v. *Hoboken City Bank*, 30 N. J. Law, 61. The failure of the appellant to offer to return the check and to demand repayment within the time prescribed by the rules of the clearing house would therefore not impair its claim against the payee for the restoration of the fund if its right of recovery should be found to be otherwise perfect."

In

Merchants National Bank v. *National Bank of the Commonwealth*, 139 Mass. 518,

it was said of the Boston Clearing House Association:

"To the regulations of this association the customers of the banks are not parties, and whatever effect is to be given to them as between the banks, their customers are not in a situation to claim the benefit of them, nor are they liable to be injuriously affected by them."

In

Brady on Bank Checks, (2d Ed.), at page 503,

it is said:

"While the rules enacted by the banks which comprise a clearing association are binding upon the members of the association they are not, as a general rule, permitted to have any effect upon the rights of outsiders, such as depositors and other customers of the banks. Clearing house rules are not binding on such parties, nor have they the right to claim any benefit under them, unless they contract with reference to the rules. And the rules are not binding upon member banks in their dealings with each other wherein the clearing house is not involved."

In

Michie on Banks and Banking, at page 165,

it is said:

"The rules of a clearing-house association are adopted solely for the purpose of facilitating exchanges among the banks, which are its members. They do not affect the rights and liabilities of banks and persons who are not members of the association or parties to its regulations.

* * * The regular customers of or depositors in banks, however, are not parties to the rules and regulations of a clearing house of which such banks are members, and are not, therefore, in a situation to claim the benefit of them, nor liable to be injuriously affected by them. And the rules of a clearing house as such do not govern the rights of a drawer or payee of a check who are not members of the clearing house, and do not contract with express reference to such rules."

It is to be observed in this respect that although the Ashland Bank, was, of course, a banking institution, so far

as it is concerned in this transaction it was no more and no better than an ordinary individual depositor or customer of the Federal Reserve Bank. It was the payee of three of the checks which went through the Clearing House and was the endorsee of the fourth. The checks were its own property, and not merely cashed by it for Hodgkinson or anyone else. When it deposited these four checks in the Federal Reserve Bank for collection it was in no different and no better position than that of an ordinary citizen who might have walked into any loop bank which was a member of the Clearing House and deposited in his own account similar checks for collection. It was no more a member of the Clearing House than such a citizen, and as an ordinary customer or depositor in a member bank, it is no more entitled to take advantage of the Clearing House rules than the individual depositor.

In

Schneider v. *Bank of Italy, supra:*

> "The rules of the Clearing House as such do not govern the rights of a drawee or payee of a check who are not members of the Clearing House, and do not contract with express reference to such rules."

There is no evidence whatsoever in this case to show that there was any contract between the Central Bank and the Ashland Bank "with express reference" to the rules of the Chicago Clearing House. There is nothing in the case to take it out of the general rules expressed in the authorities here cited.

IV:

There being no duty owing from Central Bank to Ashland Bank under the Clearing House rules, the only possible requirement which had to be fulfilled by Central Bank was that of giving notice of dishonor or non-payment of the checks as required by law. This was done.

102 of the Negotiable Instruments Law, codifying the common law with respect to the giving of notice of dishonor, provides:

> "Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:
>
> 1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following." (Ill. Revised Statutes, Chap. 98, Sec. 124.)

The Central Bank complied with this requirement. It gave notice to the Ashland Bank, through James G. Hodgkinson, its vice-president, on Monday, April 25th, immediately upon discovering the fact that payment of the checks would create an overdraft in the Corporation's Account, and, long before "the close of business hours on the day following"—in fact at 9:30 o'clock on the morning of April 26th—the actual checks were tendered back to the Ashland Bank and demand for reimbursement made.

It would seem that the giving of any such notice was not necessary to protect the rights of the Central Bank against the Ashland Bank under the circumstances of this case, for the Ashland Bank knew, or should have known (both because of the knowledge of its vice-president, James G. Hodgkinson, and because of its conduct in carrying four

of these checks as assets on its books for 28 days without attempting to cash them), that the checks were not good when it sent them through for collection. But the statutory notice was in fact given, whether necessary or not, and we contend that at 9:30 o'clock in the morning of April 26th, at the very latest, the liability of the Ashland Bank to reimburse the Central Bank became fixed.

CONCLUSION.

We submit that the main question in controversy is whether or not the conditional settlement of the Clearing House balance became a final and irrevocable payment of the checks in question upon the lapse of time fixed by the rules of the Clearing House.

The District Court and the Circuit Court of Appeals held that settlement did not become final and irrevocable because Ashland Bank was not a member of, or affiliated with, the Clearing House and was vested with no rights based upon its rules.

Those Courts also held that such being the case all that was necessary was to give notice of dishonor as provided by the Negotiable Instrument Act, which was done.

There is, therefore, no important question of Commercial Law involved; no construction of the Negotiable Instrument Law; and certainly no holding by the Circuit Court of Appeals in conflict with the weight of authority or contrary to any principles decided in the cases cited by counsel on pages 7 and 8 of the Petition.

In every case cited by counsel the law was applied to cases where the Courts specifically held that the transactions there involved constituted final and irrevocable pay-

ment. In the cases cited by us it was uniformly held that the transactions like those in the case at bar did not constitute final and irrevocable payment.

The Circuit Court of Appeals found this as a fact and we, therefore, submitted that no reasons exist why the writ should be granted.

Respectfully submitted,

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SUBJECT INDEX.

ARGUMENT—Summary of Argument— PAGE

POINT A. Whether the Central Bank was a holder or bearer of the checks depends on the decision as to whether or not its conduct constituted final or irrevocable payment. If it did not, then the Central Bank was a holder or bearer, with all the rights of the prior holder in due course..... 1

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 600

HARRY E. HALLENBECK, Receiver of SOUTH ASHLAND NATIONAL BANK,

Petitioner,

vs.

W. F. LEIMERT, Receiver of CENTRAL MANUFACTURING DISTRICT BANK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

Point A.

Whether the Central Bank was a holder or bearer of the checks depends on the decision as to whether or not its conduct constituted final or irrevocable payment. If it did not, then the Central Bank was a holder or bearer, with all the rights of the prior holder in due course.

Under "Point A" in their brief, Counsel contend that the presentment of a check to the drawee for payment is

not a negotiation and the drawee does not become a holder, and cite certain authorities to support the contention.

We answer that this is the rule only where the drawee unconditionally pays or accepts the check. In such event it naturally follows that there is no negotiation of the check and the drawee cannot become a holder because the check has no further force.

This is all that is held by the authorities cited under this heading by Counsel. In each case cited unconditional payment was made.

In *National Bank of Commerce* v. *Seattle,* 109 Wash. 312, on page 322 (cited by Counsel), the Court states that the rule is clearly stated in *First National Bank* v. *Bank of Cottage Grove,* 59 Ore. 388, and quotes as follows:

> "When the defendant bank, which was a holder in due course presented these checks to the plaintiff bank, the drawee, *and they were honored, accepted and paid,* —(Italics ours)—the prior indorsers were thereby discharged from further liability. The checks when so paid were no longer checks within the meaning of the negotiable instrument law, but only cancelled vouchers; and the plaintiff was not a holder in due course."

Counsel quote from *National Bank of Commerce* v. *Seattle National Bank,* 109 Wash. 312; 187 Pac. 342 at 346, to a certain point and then stop. They quote as follows:

> "'Holder' refers to one who has taken the instrument as it passes along in the course of negotiation towards the drawee and not the latter."

They place a period here but such is not the case in the decision. There is a comma and the Court proceeds

> "who, upon the acceptance and payment of the instrument, thereby strips it of all negotiability and reduces it to a mere voucher or proof of payment."

Such was not the situation in the case at bar.

Here the checks come through the Clearing House and the balance was settled according to its rules. Under those rules the Central Bank had the right to send back such checks as it should elect not to pay, provided notice of non-payment was given within the prescribed time. At the time the settlement was made the checks were delivered to the Central Bank and it advanced value therefor. Between the time that such settlement was made and the checks delivered, to the time that was prescribed by the rules for giving notice of non-payment, what relation did Central Bank bear to the checks, if not that of holder or bearer? Certainly if the Central Bank had the right to return those checks, after examination and investigation, it cannot well be said that the checks were paid or accepted. They were, therefore, not reduced to "mere vouchers or proof of payment."

We contend, therefore, that the Central Bank under the circumstances was a holder in due course. But, if it be conceded that it was not a holder in due course, it seems certain that it was a holder or bearer, at least to the time that notice of non-payment was required by the Clearing House rules.

Four of the checks were endorsed by Ashland Bank to the Federal Reserve Bank, which, in turn, endorsed them payable to any bank or banker. The other check was endorsed by Ashland Bank payable to the First National Bank, which endorsed it in blank.

This made all the checks payable to bearer.

Section 9 of the Negotiable Instrument Act, Sub-section 5, provides that an instrument is payable to *bearer*

> "When although originally payable to order, it is endorsed in blank by the payee or a subsequent endorsee."

The Federal Reserve Bank and the First National Bank were holders in due course of the respective checks.

Section 58 of the Negotiable Instrument Act provides that:

> "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder."

Section 190 of said Act defines a *Holder* as:

> "The payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof."

Point B.

Settlement of the Clearing House balance did not constitute final and irrevocable payment.

The fact that the Central Bank gave its check in settlement of the Clearing House balance, and that four of the checks in question, were among those which went to make up this balance, does not constitute payment. After making such settlement, the Central Bank had the right to a reasonable opportunity to examine the checks and the accounts on which they were drawn, and dishonor the checks that were not supported by the account on which they were drawn.

The Circuit Court of Appeals properly held this to be so and that the check given by the Central Bank in settlement of the Clearing House balance did not constitute final payment.

Brady on Bank Checks (2nd Ed.) 502.

Schneider v. *Bank of Italy*, 194 Pac. 1021 (Cal.).
Columbia-K. Trust Co. v. *Miller*, 215 N. Y. 191.
Hentz v. *National City Bank*, 144 N. Y. 979.
5 Michie on Banks & Banking, 575.

In *Columbia-Knickerbocker Trust Company*, 215 N. Y. 191, in discussing the question of whether or not the settlement of a clearing house balance constituted payment of any particular check, the court said:

> "Doubtless, the adjustment of balances by the Clearing House constitutes a sort of tentative or provisional payment, but that adjustment occurs without an opportunity to the members to examine the items, verify signatures, compare the amounts with the drawers' accounts, and the like, and regardless of whether the checks are good. The constitution of the association contemplates that the members will directly adjust between themselves claims arising from the return of checks. It thus appears that the question of payment is not, and cannot be, ultimately decided until the bank upon which the check is drawn has had an opportunity at its banking house to examine the checks."

In the same decision the Court also said:

> "Concededly, the adjustment of the accounts at the Clearing House is, at most, tentative and provisional, and subject to an examination by each member of the checks drawn upon it."

In Brady on Bank Checks (2nd Ed.) 502, it is said:

> "The transaction whereby a check is delivered at the Clearing House to a representative of the bank on which it is drawn and the presenting bank receives money or credit for the amount does not in itself constitute a payment of the check."

In *Schneider* v. *Bank of Italy*, 194 Pac. 1021, (Supreme Court of Cal. 1920), two certain checks were drawn by Schneider against his account in the Bank of Italy. The

two checks were endorsed by the payee and delivered to the Wells Fargo Bank. The latter bank sent them to the clearing house where they were delivered in the course of the clearings to the clearing house representative of the Bank of Italy and in turn, for the purpose of clearing the accounts between the two banks, the Bank of Italy gave money or credit to the Wells Fargo Bank. The sole issue in the case was whether or not these two checks were paid by the Bank of Italy on that day, which was March 14, 1918. With reference to this question the court said:

> "The clearing house transaction on the morning of March 14th wherein the Wells Fargo Bank received the amount of two checks from the Bank of Italy in credit or otherwise, did not, in and of itself, constitute a payment of the checks."

In *Hentz* v. *National City Bank*, 144 N. Y. S. 979 (Supreme Court of N. Y. App. Div.):

> "Taking into consideration the rules of the clearing house, which, so far as affects the question here presented, are set forth in *Mt. Morris Bank* v. *Twenty-third Ward Bank*, 172 N. Y. 244, 64 N. E. 810, and *Citizens' Central National Bank* v. *New Amsterdam National Bank*, 128 App. Div. 554, 112 N. Y. Supp. 973, affirmed 198 N. Y. 520, 92 N. E. 1080, it at once becomes apparent, as it seems to me, that the conclusion reached by the court at Special Term is erroneous. A payment through the clearing house and a payment over the counters of a bank upon which a check is drawn are entirely different. The clearing house is simply a representative of all the banks who are members of it. Its purpose is to enable these banks to go to the clearing house each day and there present checks drawn on the presenting bank which have been sent in by some other member. The clearing house then balances the checks sent by a bank against those sent to it, and later in the day a bank either pays or receives the balance due to or owing by it; in other words, it is an adjustment of balances, solely for the convenience

of the banks who are members of the association. It is in no sense a payment binding upon the bank upon which it is drawn, so far as the payee named therein is concerned, since under one of the rules of the clearing house association a check or draft thus received may be returned to the bank from which it is received at any time that day before three o'clock in the afternoon.

The payment of a clearing house balance is not a payment of any particular check and does not become so until the time within which the check may be returned has expired. Daniel on Negotiable Instruments, par. 1622a; *Stuyvesant Bank* v. *National Mechanic's Banking Ass'n.*, 7 Lans. 197; *Merchants' National Bank* v. *Bank of the Commonwealth*, 139 Mass. 513, 2 N. E. 89."

The check given by Central Bank, in settlement of the Clearing House balance did not constitute payment and it had the right to dishonor the checks. It did so. Counsel, practically, concede this but claim that having elected to dishonor the checks, the Clearing House should have been notified by two thirty o'clock in the afternoon on the same day, in accordance with its rules; that, as the Central Bank did not give such notice, the payment became unconditional and irrevocable after two thirty o'clock in the afternoon.

Point C.

Failure of the Central Bank to notify the Clearing House in the one case, and the First National Bank, in the other, of non-payment within the time limit prescribed by the rules of the Clearing House, did not constitute final and irrevocable payment as to the Ashland Bank, as it was not a member of the Clearing House, and, therefore, in no way affected by its rules.

The rules of the Clearing House are binding upon and for the benefit of its members alone and non-members cannot claim the benefit thereof.

1 Morse on Banks and Banking, (6th Ed.) 810.

National Ex. Bank v. *Ginn & Co.*, 114 Md. 181.

Merchants Nat'l. Bank v. *National Bank of the Commonwealth*, 139 Mass. 518.

Brady on Bank Checks, (2nd Ed.) 503.

8 Michie on Bank & Banking, 165.

In 1 Morse on Banks and Banking, (6th Ed.), it is said:

"The By-laws, rules and usages are binding upon members of the association. No outside bank is under any degree of obligation to observe them. But, on the other hand, no outside bank can have any remedy against any member of the association for a breach of them. They are in the nature of a contract to which the outsider is no party. The duty of adhering to them runs from each of the members to each and all the rest, but to no other person or corporation; at least unless any special and peculiar course of dealing between any member and any outside individual has operated to place that member under an express and exceptional obligation to the outsider to adhere in all matters in which he is interested to the regulations of the clearing house. Generally, 'those who are not bound by such usages and have not contracted with reference to them, have no right to avail themselves

of them to create an obligation against those who are parties to their adoption and bound by them *inter sese* only."

In *National Exchange Bank of Baltimore* v. *Ginn & Company*, 114 Md. 181, a very similar situation to the one in the present case was presented. There, also, there was a failure on the part of the drawee bank to return a certain check within the time limited by the clearing house rules. The drawee bank in the case was a member of the Baltimore Clearing House. The payee of the check, however, was not a member and therefore stood in the same position as the Ashland Bank in this case. In discussing the effect of the drawee bank's failure to comply with the clearing house rules, the court said (p. 1027):

"As the suit is directly against the payee of the check, the situation is not affected by the rules of the clearing house through which it was presented and collected. One of these rules provides 'that errors in exchange and claims arising from the return by eleven o'clock a. m. directly between the banks, which are parties hereto, and not through the clearing house,' and that 'upon request made before eleven o'clock a. m. every bank shall extend until twelve o'clock the time for returning to it checks 'not good.' When the offer was made at about a quarter to twelve o'clock to return the check under consideration, it was refused upon the ground that it was made after 11 o'clock, and that there had been no request prior to that hour for an extension of time. It is well settled that such a regulation is binding only upon the members of the Clearing House Association. Its rules are designed exclusively for their convenience and protection as among themselves, and have no effect upon the rights or liabilities of other parties. 5 Cyc. 614; *Merchants' Nat. Bank* v. *Nat. Bank of Commonwealth*, 139 Mass. 518, 2 N. E. 89; *Overman* v. *Hoboken City Bank*, 30 N. J. Law, 61. The failure of the appellant to offer to return the check and to demand repayment within the

time prescribed by the rules of the clearing house would therefore not impair its claim against the payee for the restoration of the fund if its right of recovery should be found to be otherwise perfect."

In *Merchants National Bank* v. *National Bank of the Commonwealth*, 139 Mass. 518, it was said of the Boston Clearing House Association:

"To the regulations of this association the customers of the banks are not parties, and whatever effect is to be given to them as between the banks, their customers are not in a situation to claim the benefit of them, nor are they liable to be injuriously affected by them."

In Brady on Bank Checks, (2d Ed.) at page 503, it is said:

"While the rules enacted by the banks which comprise a clearing association are binding upon the members of the association they are not, as a general rule, permitted to have any effect upon the rights of outsiders, such as depositors and other customers of the banks. Clearing house rules are not binding on such parties, nor have they the right to claim any benefit under them, unless they contract with reference to the rules. And the rules are not finding upon member banks in their dealings with each other wherein the clearing house is not involved."

In Michie on Banks and Banking, at page 165, it is said:

"The rules of a clearing-house association are adopted solely for the purpose of facilitating exchanges among the banks, which are its members. They do not affect the rights and liabilities of banks and persons who are not members of the association or parties to its regulations.

* * * The regular customers of or depositors in banks, however, are not parties to the rules and regulations of a clearing house of which such banks are members, and are not, therefore, in a situation to claim the benefit of them, nor liable to be injuriously affected by them. And the rules of a clearing house as such do

not govern the rights of a drawer or payee of a check who are not members of the clearing house and do not contract with express reference to such rules."

It is to be observed in this respect that although the Ashland Bank, was, of course, a banking institution, so far as it is concerned in this transaction it was no more and no better than an ordinary individual depositor or customer of the Federal Reserve Bank. It was the payee of three of the checks which went through the Clearing House and was the endorsee of the fourth. The checks were its own property, and not merely cashed by it for Hodgkinson or anyone else. When it deposited these four checks in the Federal Reserve Bank for collection it was in no different and no better position than that of an ordinary citizen who might have walked into any loop bank which was a member of the Clearing House and deposited in his own account similar checks for collection. It was no more a member of the Clearing House than such a citizen and as an ordinary customer or depositor in a member bank, it is no more entitled to take advantage of the Clearing House rules than the individual depositor.

In *Schneider* v. *Bank of Italy, supra*:

"The rules of the Clearing House as such do not govern the rights of a drawee or payee of a check who are not members of the Clearing House, and do not contract with express references to such rules."

There is no evidence whatsoever in this case to show that there was any contract between the Central Bank and the Ashland Bank "with express reference" to the rules of the Chicago Clearing House. There is nothing in the case to take it out of the general rules expressed in the authorities here cited.

From the foregoing it will appear that the settlement of

the Clearing House balance did not constitute irrevocable and final payment. If we are correct in our conclusions, this is practically conceded by our opponents. But, they say, that if this is conceded, the payment became final when notice of non-payment was not given by two thirty o'clock in the afternoon in accordance with the rules of the Clearing House.

Our answer is that the rules of the Clearing House have nothing to do with the rights and obligations of Ashland Bank, because it was not a member. We submit that the authorities, quoted above, sustain this answer.

Then our opponents say (Under Point "A" of their brief) that:

> "it would seem to be a manifest absurdity to say that the obligation assumed by an indorser to reimburse subsequent holders if the drawee refuses to pay the check upon presentment, is an engagement by the indorser with the drawee himself, the very party on whom the check is an order to pay."

Of course, this would be true if the drawee paid or accepted. It would then be an absurdity to ask an indorser to reimburse. And that is what the cases, cited by Counsel, hold.

But that is not the situation here. The checks in question were only a part of a large number of checks presented by the Clearing House. The rules of the Clearing House provide in substance this: "We know that when these checks are presented to you, you will have no immediate opportunity to investigate. Nevertheless, our rule is that you must make settlement at the time the checks are presented. After that you may have the opportunity to investigate. If you find on such investigation that some of the checks should be dishonored—should not be paid, we grant you the right to dishonor and not pay. But we say, that so far

as the liability of any of our members is concerned, you must make your election by a certain time. If by that time you do not notify us that you have elected to refuse payment—to dishonor the checks—then, so far as our members are concerned, it will be considered that you have honored the checks; and, so far as they are concerned, this consideration will be binding on you and you will have no right to hold any of them, if you later find that payment or acceptance should not have been made.

Therefore, so far as the endorsers were concerned, who were members of the Clearing House, the notice of non-payment not having been given within the prescribed time, the settlement was final payment as to them.

But Ashland Bank was not a member of the Clearing House. However, it was the first endorser, the payee. There was no obligation on the Central Bank to give notice to subsequent endorsers unless it wanted to hold them. When notice is given to the last endorser, he may hold the prior one and so on to the first. Here Central Bank elected to hold the first endorser, Ashland Bank, the payee, and it was not a member of the Clearing House. This being so the Clearing House rules did not apply and notice was properly given within the time prescribed by law.

The situation is the same as if the Ashland Bank had presented the checks to the Central Bank for payment and it had given the money to the Ashland Bank on condition, only, that Central Bank would have the right to investigate the account and, then, if the account was found to be unsatisfactory, to return the checks within the time prescribed by law and get the money back from the Ashland Bank. It is the same as if the Central Bank said to the Ashland Bank, at the time the check was presented that it would turn over the money but only on condition that

Ashland Bank would return the money, if, on examination, Central Bank elected to return the checks within the time prescribed by law.

Under "Point E" of their brief, Counsel state that the Trial Court and the Court of Appeals, both held that the Clearing House transactions in the case of four checks, and the transaction with the First National Bank in the case of one check, did not constitute payment and that upon this premise, it necessarily follows that if payment was not made by the Central Bank to the Federal Reserve Bank, or to the First National Bank no money of the Central Bank passed from the Federal Reserve Bank or from the First National Bank to the Ashland Bank, etc.

This is purely a theoretical assumption.

The evidence shows without contradiction that the Federal Reserve Bank and the First National Bank got the money from the Central Bank and, in turn, gave the money to the Ashland Bank.

Point D.

There was no duty owing from Central Bank to Ashland Bank under the Clearing House rules. Therefore, the only possible requirement was that of giving notice of non-payment of the checks as required by law. This was done. Central Bank was not required to give notice to all endorsers but only to those it intended to hold.

Section 102 of the Negotiable Instrument Law, with respect to the giving of notice of dishonor, provides:

> "Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:
>
> 1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following."

The Central Bank complied with this requirement. It gave notice to the Ashland Bank, through James G. Hodgkinson, its vice-president, on Monday, April 25th, immediately upon discovering the fact that payment of the checks would create an overdraft in the Corporation's Account, and, long, before "the close of business hours on the day following"—in fact at nine thirty o'clock on the morning of April 26th—the actual checks were tendered back to the Ashland Bank and demand for reimbursement made.

In *National Exchange Bank of Baltimore* v. *Ginn & Co.*, 114 Md. 181, (cited above and also cited by Counsel under their "Point B") the Court holds that the rules of the Clearing House are binding only on its members and have no effect upon the rights and liabilities of other parties and that (page 184):

> "The failure of the appellant to offer to return the check and to demand repayment within the time prescribed by the rules of the Clearing House would therefore not impair its claim against the payee for the restoration of the fund if its right of recovery should be otherwise perfect."

In the case at bar the settlement remained conditional as to the endorsers who were members of the Clearing House until two thirty o'clock in the afternoon of the same day the checks were presented and notice not having been given by that time, they were discharged. It remained conditional until the expiration of the time prescribed by the Negotiable Instrument law as to non-members. Notice was given to Ashland Bank within that time.

Further, in 3 Ruling Case Law, Sec. 444, at page 1222, it is stated:

> "It is thoroughly settled that the holder of a promissory note, on which there are several indorsers is not bound to give notice to any except the one he intends

to hold liable, and that the indorser so notified has no right to complain of the holder, that his previous indorsers were not notified."

In 8 Corpus Juris, 643, Sec. 905, it is stated:

"The holder, however, may give notice to a remote indorser whom he intends to hold liable, without giving notice to or through intermediate parties, since he is not obliged to give notice to any party to whom he does not look for payment, notwithstanding the fact that by so doing he may discharge all intermediate parties for want of notice."

A large number of authorities are cited to sustain this principle. There seems to be none to the contrary. It would unduly lengthen this argument to cite them. As stated the rule is thoroughly settled and well known.

CONCLUSION.

It is, therefore, respectfully submitted that this Court should affirm the decision of the Circuit Court of Appeals for the Seventh Circuit.

DANIEL M. HEALY,
Counsel for Respondent, W. F. Leimert, Receiver of Central Manufacturing District Bank.

SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1934.

Harry E. Hallenbeck, Receiver of South Ashland National Bank, Petitioner, *vs.* W. F. Leimert, Receiver of Central Manufacturing District Bank.	Petition for certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 29, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondent, receiver of Central Bank, brought suit against petitioner, receiver of Ashland Bank, in the District Court, Northern District of Illinois, to recover upon five checks drawn upon the former and endorsed by the latter bank. Jury having been waived, the trial court made findings of fact with conclusions of law and entered judgment in favor of respondent here for the sum demanded. There is no bill of exceptions; the findings control.

From these it appears—

All the banks spoken of herein were located in Chicago. James G. Hodgkinson was vice-president and director of Ashland Bank; also vice-president of Hodgkinson & Durfee, Inc. which had a deposit account with Central Bank. Against this account he drew the corporation's five checks, and delivered them to Ashland Bank. It endorsed and deposited four of them with Federal Reserve Bank for collection, Saturday, April 23rd. The fifth check duly endorsed went for collection to the First National Bank.

The Federal Reserve and First National Banks were regular members of the Chicago Clearing House Association; Central Bank an affiliate; Ashland Bank was neither member nor affiliate. A rule of the Chicago Clearing House provided—

> "In order that the member banks presenting such items may have an opportunity to give special instructions as to the protest of unpaid items, that notice of nonpayment of any such items drawn on banks . . . which are . . . affiliated with members of the association . . . and which have

> their places of business located . . . on 12th Street or south thereof, be given by telephone before two-thirty o'clock (2:30) p. m. of the same day to the member banks presenting such items through the Clearing House . . .".

Early Monday Morning, April 25th, The Federal Reserve Bank turned in the four deposited checks to the Chicago Clearing House. According to the rules and practices, Central Bank settled the indicated adverse balance at the Clearing House and before 11:30 a. m. received the checks. Several hours later it learned that Hodgkinson & Durfee lacked funds to meet them.

On the same day First National Bank, which carried accounts with both Central and Ashland Banks, charged the check received from the latter against the former's account, and sent it by messenger to the drawee's place of business, where it was received and retained.

When the Central Bank ascertained the status of Hodgkinson & Durfee's account, it notified Hodgkinson. At 9:30 a. m. the following morning, April 26th, the five checks were returned to Ashland Bank for reimbursement. This was refused. No notice was given by Central Bank to either Federal Reserve or First National Bank. They "got the money from the Central Bank and in turn gave the money to the Ashland Bank".

The trial court concluded the checks were not unconditionally paid; also that the notice to Ashland Bank on April 25th under Sec. 102, Negotiable Instruments Law, Par. 124, Cahill's Ill. R. S.) sufficed to fix responsibility. Accordingly judgment went against petitioner.

The Circuit Court of Appeals affirmed, and among other things, said—

> "It is conceded by both parties that if payment were actually made by the bank on which the checks were drawn (in this case the Central Bank) or if, instead of actual payment, an unconditional credit had been given, then, though it were later discovered that there were insufficient funds on deposit in the account of the maker to cover the checks, the payment would be absolute and irrevocable. . . . The method of transacting business followed by the Clearing House Association contemplates that the members will immediately examine the various items which go to make up the balance

and only the subsequent lapse of time without electing to dishonor the check causes the settlement to become final. In the case of members of the Clearing House, the time within which notice must be given is fixed by agreement. In the case of banks not members of the Clearing House, the provisions of the Negotiable Instruments law must govern as to what length of time may elapse before the tentative payment becomes final and irrevocable. . . . The Ashland Bank was not a member of, or affiliated with, the Clearing House Association and is vested with no rights based upon its rules. . . . The Central Bank having elected to recover from the Ashland Bank directly, all that was necessary to bring the giving of notice of dishonor within the provisions of the Negotiable Instruments Law was that notice be given 'before the close of business hours on the day following' ".

And it cited Cahill's Ill. Stat., 1933, c. 98, par. 124 (Sec. 102, Negotiable Ins. Law) which provides:

"Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

"1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following".

We think the conduct of Central Bank constituted final irrevocable payment of the five checks, as if cash had passed over the counter. And if this be correct, counsel do not maintain that the judgment below can be sustained.

Settlement at the Clearing House, in respect of the four checks turned in by the Federal Reserve Bank, was at first provisional, subject to be withdrawn or corrected upon notice given before 2:30 o'clock. After this provisional settlement the drawee accepted delivery of the checks and gave no notice of dishonor prior to two-thirty o'clock. The time having expired, payment became absolute. The fifth check, presented by the First National Bank, after being charged to the drawee's account, was not dishonored, but upon presentation was accepted without reservation. Payment then became complete and irrevocable. Central Bank did not repudiate or question the charge against its account at the First National Bank. On the contrary this was ratified. See *Nat. Bank*

v. *Burkhardt*, 100 U. S. 686, 689; *Am. Nat. Bank* v. *Miller*, 229 U. S. 517, 520. Both collecting banks transmitted the proceeds received to Ashland Bank.

Apparently the argument in support of the judgment below is this—

The checks in the hands of the collecting banks were payable to bearer, and held in due course. The drawee bank did not in fact pay the checks, but after becoming holder, dishonored them. Thereafter, within the time prescribed by Sec. 102, Negotiable Instruments Law, it gave notice to the first endorser and thus fixed the obligation to pay. Admitted payment to the collecting bank is excused upon the theory that this resulted from rules of the Clearing House, not applicable to Ashland Bank, a non-member.

Since payment was actually made to the collecting bank, and never repudiated, it seems impossible to conclude that the secondary liability assumed by endorsers remained in force. As the checks were not dishonored when presented, the endorser could only have been advised that when paid the drawee lacked funds to meet them.

The Ashland Bank is not seeking to enforce rules of the Clearing House. It asks that proper effect be given to actual payment made through compliance with those rules. The duty of the drawee bank was either to pay or refuse to pay when the holder presented and demanded final payment of the checks. It paid them. The tentative payments became final—as much so as if money had passed. No objection is made to the Clearing House rules and we find none.

Section 102 of the Negotiable Instruments Law refers to notice of dishonor, not to the time within which a dishonored check may be returned, nor to advice concerning an overdraft. It does not relate to tentative payments and is without application in circumstances like those here disclosed. At least that seems clear to us and there is no holding to the contrary by the courts of Illinois.

The record reveals no attempt to recover because of fraud, mutual mistake, or other similar circumstance.

The questioned judgment must be reversed. One will be entered here for the petitioner.

Reversed.